CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 572

JAMES LOUIS GIROUARD, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 30, 1945.

CERTIORARI GRANTED DECEMBER 10, 1945.

SUPREME COURT OF THE UNITED STATES

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JAMES LOUIS GIROUARD, PETITIONER,

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Judd & Detweiler (Inc.), Printers, Washington, D. C., January 14, 1946.

[fol. 1]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

OCTOBER TERM, 1944

No. 4858

UNITED STATES OF AMERICA, Appellant,

v.

JAMES LOUIS GIROUARD, Appellee

IN UNITED STATES DISTRICT COURT: DISTRICT OF MASSACHUSETTS

No. 658, Naturalization Docket

In re: Petition for Citizenship of JAMES LOUIS GIROUARD

[fol. 2] DECLARATION OF INTENTION—Filed August 8, 1940

Duplicate (To accompany monthly report on Form 2208)
No. 292626.

UNITED STATES OF AMERICA

Declaration of Intention

(Invalid for all purposes seven years after the date hereof)

DISTRICT OF MASSACHUSETTS, ss:

In the United States District Court of Mass. at Boston.

I, James Louis Girouard, now residing at 23 Park St., Stoneham, Middlesex Co., Mass., occupation Engineer, aged 37 years, do declare on oath that my personal description is: Sex male, color white, complexion medium, color of eyes grey, color of hair brown, height 5 feet 6 inches; weight 140 pounds; visible distinctive marks none; race, French; nationality, British. I was born in Moncton, N. B., Canada, on Aug. 24, 1902. I am married. The name of my wife or husband is Mabel, we were married on April 9, 1923, at Moncton, N. B., Canada; she or he was born at Canaan, N. B., Canada, on Feb. 24, 1905, entered the United States at Haverhill, Mass., on July 18, 1923, for permanent residence thereon, and now resides at Stoneham, Mass. I have one children, and the name, date and place of birth,

and place of residence of each of said children are as follows: Louise T., Dec. 25, 1925, Stoneham, Mass. I have not heretofore made a declaration of intention; Number ——, on —— ——, at —— ——, my last foreign residence was Moncton, N. B., Canada. I emigrated to the United States of America from Moncton, N. B., Canada, my lawful entry for permanent residence in the United States was at Vanceboro, Maine, under the name of James Girouard, on July 9, 1923, on the vessel Can. Pac. R. R. (If other than by vessel, state manner of arrival.)

I will, before being admitted to citizenship, renounce [fol. 3] forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which I may be at the time of admission a citizen or subject; I am not an anarchist; I am not a polygamist nor a believer in the practice of polygamy; and it is my intention in good faith to become a citizen of the United States of America and to reside permanently therein; and I certify that the photograph affixed to the duplicate and triplicate hereof is a likeness of me.

I swear (affirm) that the statements I have made and the intentions I have expressed in this declaration of intention subscribed by me are true to the best of my knowledge and belief; So help me God.

James Louis Girouard.

Subscribed and sworn to before me in the form of oath shown above in the office of the Clerk of said Court, at Boston, Mass., this 8th day of August, anno Domini, 1940. Certification No. 1-309159 from the Commissioner of Immigration and Naturalization showing the lawful entry of the declarant for permanent residence on the date stated above, has been received by me. The photograph affixed to the duplicate and triplicate hereof is a likeness of the declarant. James S. Allen, Clerk of the U. S. District Court, by John F. Davis, Deputy Clerk. (Seal.)

[Photo of James Louis Girouard (Girard).]

No. 419175.

Form 2202-L. A U. S. Department of Labor, Immigration and Naturalization Service.

[fol. 4] IN UNITED STATES DISTRICT COURT

Form N-400 (Old A-2214)

U. S. Department of Justice, Immigration and Naturalization Service

(Edition of 7-15-42)

No. 1-309159.

APPLICATION FOR A CERTIFICATE OF ARRIVAL AND PRELIMINARY FORM FOR PETITION FOR NATURALIZATION—Filed January 26, 1943

264212.

For use in searching records of arrival:
Records examined: Card index ——— Index books ——— Manifests ——— ———.
Record Found: Place ——— ———.
Name ——— ———
Date ——— ———. Manner ——— ———.
Marital status ——— ———.
——— ——— (Signature of person making search.)

(Use Form N-215 in issuing certificate of arrival on this application)

To the Applicant: Do not write above this line. Read carefully and follow the instructions on last page hereof. Take or mail this application and your money order to: Immigration and Naturalization Service, Boston, Mass.

[fol. 5] Date: Dec. 14, 1942.

I, James Louis Girouard (Girard), residing at 23 Park St., Stoneham, Middlesex, Mass., desire to file a petition for naturalization in the United States District Court at Boston, Mass. I submit herewith a statement of facts to be used in filing such petition; three photographs of myself, each of which I have signed, and my declaration of intention (first papers), if one is required.

I hereby apply for a Certificate of Arrival (if required) showing my lawful entry into the United States for permanent residence and enclose money order No. ——— for $2.50, payable to the order of the "Commissioner of Immi

gration and Naturalization, Washington, D. C.," in payment therefor. (See reference to "Money Order," page 4.)

(1) I arrived in the United States through the port of Vanceboro, Maine, under the name of James Louis Girouard, on July 9, 1923, on the vessel Can. Pac. R. R. (If arrival was through (Canada, Mexico) I arrived at the port of —— —— (Canada, Mexico), on —— ——, on the vessel —— ——).

(2) I have — been absent from the United States as follows: (1929 3 wks.); (1931 2 wks.); (1936 2 wks.); via auto; 1929, Houlton, Maine. 1931, Houlton, Me. 1936, Calais, Maine. I have not been absent at any other time.

(3) I have — used another name in this country than that given above. (If so) It was James Louis Girard. I used that name because members of family who preceded me to U. S. used short spelling of name.

(4) The full name of the person shown on my steamship ticket was James Louis Girouard.

(5) I was born in Moncton, N. B., Canada, on Aug. 24, 1902.

[fol. 6] (6) My father's full name is was Oliver Girouard.

(7) My mother's maiden name was Mary Ellen Dunn.

(8) (If a married woman) My maiden name was —— ——.

(9) My last foreign residence was Moncton, N. B., Canada.

(10) The place where I took the ship or train which landed me in the United States was Moncton, N. B., Canada.

(11) The ticket on which I came to this country was bought at Moncton, N. B., Canada.

(12) (If arrival by ship) Name of steamship line was ——, first, second, or third cabin ——. I arrived as a passenger, stowaway, seaman, member of crew, or otherwise —— ——.

(13) I traveled on (an immigration visa, a passport, or permit to reenter) —— ——.

(14) I paid $8.00 head tax at St. John, N. B., Canada, on July 9, 1923.

(15) I was — examined by United States immigration officers at St. John, N. B., Canada.

(16) (If not examined, state why, and give the circumstances of your entry) —— ——.

(17) The person in the United States to whom I was coming was Mr. Manchester Ryder.

(18) The place in the United States to which I was going was Haverhill, Mass.

(19) The names of some of the passengers or other persons I traveled with and their relationship to me, if any, are Mrs. James Giroiard, Wife.

(20) In what places in the United States have you resided? Haverhill, Mass., from July, 1923, to Feb., 1924. Stoneham, Mass., from Feb., 1924 to present date.

(21) What were the names, occupations, and addresses [fol. 7] of your employers during the last 5 years? New England Sanitarium and Hospital, Woodland Road, Stoneham, Mass., Feb., 1924, to present date.

(22) Do you understand the principles of government of the United States? Yes.

(23) Do you fully believe in the form of government of the United States? Yes.

(24) Are you ready to answer questions as to the principles and form of government of the United States? Yes. What have you done to prepare yourself for an examination on the government of the United States? I am studying Civics and Government.

(25) Have you read the following oath of allegiance? Yes.

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without

any mental reservation or purpose of evasion: So Help Me God.

Are you willing to take this oath in becoming a citizen? Yes. Of what country are you now a citizen or subject? Great Britain.

(26) If necessary, are you willing to take up arms in defense of this country? No (Non-combatant) Seventh Day Adventist. Have you ever during the time this country was at war, deserted the military or naval forces of the United States, or departed from the jurisdiction of the enrollment district or the United States to avoid draft into the military or naval forces of the United States? No.

[fol. 8] (27) If not now married, have you ever been married? —— ——. Are you divorced? ——.

(28) Are you a believer in anarchy or the unlawful damage, injury, or destruction of property, or sabotage? No. Do you belong to or are you associated with any organization which teaches or advocates anarchy or the overthrow of existing government in this country? No.

(29) Have you ever been an inmate of an insane asylum? No.

(30) Have you ever been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation? Yes. If so, give full particulars. Fined $5.00 for alleged exceeding of 25 m.p.h. speed limit in City of Worcester, Mass.

(31) (a) In what place in the United States did you meet for the first time your first witness named on the opposite page? Stoneham, Mass. How often have you seen this witness each month since the date you first met him (her)? Almost daily. At what places? Am associated with him in my work. (b) In what place in the United States did you meet for the first time your second witness named on the opposite page? Stoneham, Mass. How often have you seen this witness each month since the date you first met him (her)? Weekly. At what places? Church.

(32) Have you ever been deported from the United States, or are deportation proceedings now pending against you? No. If so, state all facts. ——.

(33) Was your father or mother ever a citizen of the United States? No. If so, give full particulars ——.

(34) Did you register under the Alien Registration Act of 1940? Yes. If so, state the number of your Alien Registration Receipt Card. 1949835.

(35) Did you yourself fill out this form? Yes. If not, give the name and address of the person who did ——.

[fol. 9] I certify that all the statements made by me in this application and form are true to the best of my knowledge and belief.

James Louis Girouard, 23 Park St., Stoneham, Mass.

[Photograph of James Louis Girouard.]

In United States District Court

Duplicate (To accompany monthly report on Form N-4)

Petition for Naturalization United States of America
Filed November 3, 1943

No. 264212

Petition for Naturalization

[Under General Provisions of the Nationality Act of 1940
(Public, No. 853, 76th Cong.)]

To the Honorable the U. S. District Court of Mass. Dist. at Boston. This petition for naturalization, hereby made and filed respectfully shows:

(1) My full, true, and correct name is James Louis Girouard.

(2) My present place of residence is 23 Park St., Stoneham, Middlesex, Mass.

(3) My occupation is, engineer.

(4) I am 41 years old.

(5) I was born on August 24, 1902, in Moncton, N. B., Canada.

(6) My personal description is as follows: Sex, male; color, white; complexion, medium; color of eyes, brown; color of hair, brown; height 5 feet 6 inches, weight 145 [fol. 10] pounds, visible distinctive marks, scar on neck; race, white; present nationality, British.

(7) I am —— married; the name of my wife or husband is Mabel; we were married on April 9, 1923, at Moncton, N. B., Canada; he or she was born at Cannan, Queens Co., N. B., Canada, on Feb. 21, 1905, and entered the United States at Vanceboro, Maine, on July 9, 1923, for permanent residence in the United States and now resides with me and was naturalized on —— —— at —— ——, certificate No. ——; or became a citizen by ——.

(8) I have one children; and the name, sex, date and place of birth, and present place of residence of each of said children who is living, are as follows: Louise (f), Dec. 25, 1925, Stoneham, Mass.; with me.

(9) My last place of foreign residence was Moncton, N. B., Canada.

(10) I emigrated to the United States from Moncton, N. B., Canada.

(11) My lawful entry for permanent residence in the United States was at Vanceboro, Maine, under the name of James Gironard, on July 9, 1923, on the C. P. R.R., as shown by the certificate of my arrival attached to this petition.

(12) Since my lawful entry for permanent residence I have not been absent from the United States, for a period or periods of 6 months or longer, as follows: Departed from the United States: Port, —— ——. Date (Month, day, year) —— ——. Vessel or other means of conveyance —— ——. Returned to the United States: Port —— ——. Date (Month, day, year) —— ——. Vessel or other means of conveyance —— ——.

(13) I declared my intention to become a citizen of the United States on August 8, 1940, in the U. S. D. C. Court of Mass. Dist. at Boston, Mass.

[fol. 11] (14) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and

forever all allegiance and fidelity to any foreign prince, potentate, State, or sovereignty of whom or which at this time I am a subject or citizen, and it is my intention to reside permanently in the United States.

(15) I am not, and have not been for the period of at least 10 years immediately preceding the date of this petition, an anarchist; nor a believer in the unlawful damage, injury, or destruction of property, or sabotage; nor a disbeliever in or opposed to organized government; nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government.

(16) I am able to speak the English language (unless physically unable to do so).

(17) I am, and have been during all of the periods required by law, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States.

(18) I have resided continuously in the United States of America for the term of 5 years at least immediately preceding the date of this petition, to wit, since July 9, 1923, and continuously in the State in which this petition is made for the term of 6 months at least immediately preceding the date of this petition, to wit, since July 9, 1923.

(19) I have not heretofore made petition for naturalization: No ——, on —— ——, at —— ——, in the —— Court, and such petition was dismissed or denied by that Court for the following reasons and causes, to wit: —— and the cause of such dismissal or denial has since been cured or removed.

(20) Attached hereto and made a part of this, my peti-[fol. 12] tion for naturalization, are my declaration of intention to become a citizen of the United States (if such declaration of intention be required by the naturalization law), a certificate of arrival from the Immigration and Naturalization Service of my said lawful entry into the United States for permanent residence (if such certificate of arrival be required by the naturalization law), and the affidavits of at least two verifying witnesses required by law.

(21) Wherefore, I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America, and that my name be changed to ———.

(22) I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, that the same are true to the best of my own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters I believe them to be true, and that this petition is signed by me with my full, true name: So Help Me God.

James Louis Gironard.

Form N-405 (Old 2204 L-B). U. S. Department of Justice, Immigration and Naturalization Service (Edition of 3-1-42).

AFFIDAVIT OF WITNESSES

The following witnesses, each being severally, duly, and respectively sworn, depose and say:

My name is Robert Griffin, my occupation is engineer, I reside at New England Sanitorium, Stoneham, Mass., and My name is Norma Griffin, my occupation is housewife, I reside at New England Sanitorium, Stoneham, Mass.

I am a citizen of the United States of America; I have personally known and have been acquainted in the United [fol. 13] States with said Gironard, the petitioner named in the petition for naturalization of which this affidavit is a part, since May, 1938; to my personal knowledge the petitioner has resided, immediately preceding the date of filing this petition, in the United States continuously since the date last mentioned, and at Stoneham, in the State of Mass., continuously since May, 1938, and I have personal knowledge that the petitioner is and during all such periods has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and in my opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

I do swear (affirm) that the statements of fact I have made in this affidavit of this petition for naturalization subscribed by me are true to the best of my knowledge and belief: So Help Me God.

Norma F. Griffin, Robert Griffin.

Subscribed and sworn to before me by the above-named petitioner and witnesses in the respective forms of oath shown in said petition and affidavit in the office of the Clerk of said Court at Boston, Mass., this 3rd day of November, Anno Domini 1943. I hereby certify that Certificate of Arrival No. 1-309159 from the Immigration and Naturalization Service, showing the lawful entry for permanent residence of the petitioner above named, together with Declaration of Intention No. 292626 of such petitioner, has been by me filed with, attached to, and made a part of this petition on this date.

James S. Allen, Clerk, by Arthur D. Grandison, Deputy Clerk. (Seal.)

[fol. 14] The cause was then continued from term to term to the June Term, 1944, when on August 1, 1944, said cause came on for hearing on the aforementioned petition for naturalization, the Honorable George C. Sweeney, District Judge, sitting, and after hearing, the following order admitting petitioner to citizenship was entered:

In United States District Court

Order of Court—August 1, 1944

Date, August 1, 1944.

List No. 888.

This list consists of 2 sheets. Sheet No. 2.

Commonwealth of Massachusetts,
County of Suffolk, ss:

In the District Court of the United States

Upon consideration of the petitions for naturalization listed on List No. 888, sheet(s) 1, dated August 1, 1944, presented in open Court this 1st day of August, A. D., 1944, It Is Hereby Ordered that each of the said petitions be, and hereby is, denied, except those petitions listed below.

Recommendation of Designated Officer Is Disapproved as to the Petitions Listed Below, and each of said petitioners so listed having appeared in person, It Is Hereby Ordered that each of them be, and hereby is, admitted to become a citizen of the United States of America. Prayers

for change of name listed below granted, except in petition(s) No. 266895.

	Petition No.	*Name of Petitioner*	*Change of Name*
1	239507	Stefano Milone.	
2	242819	Maria Teixeira.	
3	264212	James Louis Gi[illegible]ouard.	
4		–	
5		–	
6		–	
7		–	
[fol. 15] 8		–	
9		–	
10		–	
11		–	
12		–	
13		–	
14		–	
15		–	
16		–	
17		–	
18		–	
19		–	
20		–	

It is further ordered that petitions listed below be continued for the reasons stated.

Petition No.	*Name of Petitioner*	*Cause for Continuance*
238336	Giuseppe Cali	Absent
239750	Stanley Dobrisky	Absent
243239	Sergio Anthony Pizzi	Six months' clear record
260517	Barney Barmash	Absent
267417	Adolphe Demanche	Absent

By the Court.

Geo. C. Sweeney, Judge.

[fol. 16] IN UNITED STATES DISTRICT COURT

No. 264212

NOTICE OF EXCEPTION AND ORDER THEREON—Filed August 25, 1944

I, James P. O'Sullivan, United States Naturalization Examiner, hereby give notice of my exception to the ruling of this honorable court in the petition for naturalization above referred to, which ruling was as follows:

> That since the Selective Service and Training Act permits, as a matter of right, an applicant for the draft to express a willingness to serve in the armed forces of the United States, but as a non-combatant, then this petitioner by exercising that right is still a person who can take an unqualified oath of allegiance to the United States and is therefore eligible to citizenship.
>
> (Signed) James P. O'Sullivan.

Date, Aug. 25, 1944.

ORDER

The Court being fully advised in the premises, it is hereby ordered and decreed that the exception shall be noted and the Clerk of Court instructed to file this notice of exception to the court's ruling with the original petition on file in his office.

(Signed) George C. Sweeney, Judge.

[fol. 17] From the foregoing order of court admitting petitioner to citizenship, entered on August 1, 1944, the United States claims an appeal to the United States Circuit Court of Appeals for the First Circuit.

IN UNITED STATES DISTRICT COURT

STATEMENT IN NARRATIVE FORM OF PETITIONER'S TESTIMONY BEFORE THE COURT, IN ACCORDANCE WITH RULE 75(c)—Filed December 28, 1944.

In accordance with Rule 75(c) of the Federal Rules of Procedure, Edmund J. Brandon, United States Attorney

for the District of Massachusetts, for, and on behalf of the United States of America now comes and makes this condensed statement of petitioner's testimony before the Court.

Statement

The appellee, James Louis Gironard, a native and former resident of Canada, entered the United States in 1923, and has since resided in this country. In 1940 he filed a declaration of intention to become a citizen of the United States, and in 1943 a petition for naturalization.

In answer to the question, on the preliminary form of application, as to whether he was willing to take up arms in defense of this country, the said appellee answered: "No. (Seventh Day Adventist, non-combatant)."

On preliminary examination the appellee, then the petitioner, stated to the Examiner that this answer was based on purely religious grounds. In his Selective Service questionnaire he had claimed exemption from both combatant and non-combatant military service as a conscientious objector. On March 9, 1943, he made a sworn statement before George F. Sears, Immigrant Inspector, which is included in the Designation of Contents of Record, and marked "4". This also was presented to the Judge at [fol. 18] the hearing. At the time of the hearing before the Court the Naturalization Examiner recommended that the petition of said appellee, James Louis Gironard, be denied.

This hearing was held before the Court on August 1, 1944, at which time the District Court Judge interrogated the appellee, James Louis Gironard. No transcript of this examination was made, but it appears that the appellee testified that he was a member of the Seventh Day Adventist sect, of whom he said there were apparently 10,000 serving in the armed forces of the United States as non-combatants, especially in the Medical Corps, and that he was willing to serve in the army as such non-combatant, but would not bear arms. The Court ordered him admitted to citizenship.

To this ruling a Notice of Exception was immediately filed with the Court by a representative of the United States Immigration and Naturalization Service, which the

Judge ordered noted and instructed that same be filed. The ruling reads as follows:

"That since the Selective Service and Training Act permits, as a matter of right, an applicant for the draft to express a willingness to serve in the armed forces of the United States, but as a non-combatant, then the petitioner by exercising that right is still a person who can take an unqualified oath of allegiance to the United States, and is therefore eligible to citizenship."

Edmund J. Brandon, United States Attorney; Arthur J. B. Cartier, Assistant United States Attorney.

[fol. 19] In United States District Court

Sworn Statement of James Louis Gironard

1500-D-292626

Boston, Massachusetts, March 9, 1943

In response to our letter of February 23, 1943, under file No. 1500-D-292626, Mr. James Louis Gironard called at this office, and after being duly sworn testified as follows before Immigrant Inspector George F. Sears:

Q. What is your correct name?

A. James Louis Gironard.

Q. Are you the same James Louis Gironard who filed declaration of intention No. 2-2626 in the United States District Court on August 8, 1940, and are now applying for to petition for naturalization?

A. Yes, sir.

Q. It is noted on page 2 under question 26 which asks, "If necessary, are you willing to take up arms in defense of this country" your answer is "No," which has been qualified by the word "Non Combatant," have you any remark to make on this point?

A. Not except that it is a purely religious matter with me. I have no political or personal reasons other than that.

Q. Then you are unwilling to bear arms in defense of this country?

A. That is right.

Q. Have you anything further to say?

A. No, I believe there is nothing else I would add to that.

It was explained to Mr. Girouard that the Supreme Court has ruled that it is necessary that a petitioner be willing to bear arms in defense of this country.

Applicant states he prefers to present his case to the court.

James Louis Girouard.

Signed and sworn to before me at Boston, Massachusetts, this 9th day of March, 1943. George F. Sears, Acting Naturalization Examiner.

[fol. 20] Record of Selective Service Local Board No. 161

U. S. Department of Justice

Immigration and Naturalization Service

1500-B-264212

Draft Board No. 161, Town Hall, Winchester, Mass.

Boston, Mass., 1-3-43.

Sirs:

For the purpose of obtaining information from the Selective Service System concerning your record under the Selective Training and Service Act of 1940, in connection with your application for naturalization, please fill in the blanks within the black-lined box below, and return the entire form to me in the enclosed envelope, which requires no postage.

Respectfully Henry Nicolls, District Director of Immigration and Naturalization.

Only this section to be filled out by petitioner.

My full name is James Louis Girouard; I am registered with Local Board No. 161, for Winchester, Middlesex, Mass. My address which I gave when I registered was 23 Park St., Stoneham, Mass., Middlesex, Mass. My order number is 11051.

James Louis Girouard.

To the Local Selective Service Board Named Above:

Sirs:

For use in connection with naturalization proceedings please complete this form by filling out the reverse hereof from the information appearing on your records concerning the registrant whose name, address, and order number are [fol. 21] given in the space above, and return this form in the enclosed envelope which requires no postage.

Respectfully, Henry Nicolls, District Director of Immigration and Naturalization.

To the District Director of Immigration and Naturalization:

Sir:

I certify that the registrant named on the reverse hereof (whose name, address, and order number as shown on the reverse hereof accord with our records unless otherwise specified below) has filed with this Board a Questionnaire (Form 40); that if the registrant has filed a Questionnaire (Form 40), the date of the affidavit on page 7 thereof is May 7, 1943; that the entries under item 7, series IX, page 6, are as follows: "7. I have filed a declaration of intention to become a citizen of the United States (first papers). Declaration filed at Boston, Mass., on August 8, 1940, under No. 292626;" that in series X, page 6, the registrant did claim exemption from combatant or noncombatant military service as a conscientious objector; that if he did so claim, he has filed with this Board a "Special Form for Conscientious Objector" (Form 47); that any statement relating to his naturalization or to his conscientious objection to war made by said registrant on page 7 under the heading "Registrant's Statement Regarding Classification" was as follows: none, and that the classification of said registrant now is 3A(H).

Geo. W. Hayden, Clerk of Local Board No. 161.

[Official stamp of local board.]

[fol. 22] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS FOR FIRST CIRCUIT

(Under Rule 73B)

Notice is hereby given that on the Petition numbered 264212, being application numbered 6,362,142, of the above-named James Louis Girouard, of 23 Park Street, Stoneham, in said District of Massachusetts, who was admitted to citizenship by the United States District Court at Boston, in said District, on August 1, 1944, now comes Edmund J. Brandon, United States Attorney for said District of Massachusetts, for and in behalf of the United States of America, and hereby appeals to the Circuit Court of Appeals for the First Circuit from said Order.

Edmund J. Brandon, United States Attorney; Arthur J. B. Cartier, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

In accordance with Rule 75(d) of the Federal Rules of Procedure, Edmund J. Brandon, United States Attorney for the District of Massachusetts, in behalf of the United States of America, now comes and says:

Statement of Facts

The Appellee, James Louis Girouard, a native and former resident of Canada, entered the United States in 1923, and has since resided in this country. In 1940 he filed a declaration of intention to become a citizen of the United States, and in 1943 a petition for naturalization.

In answer to the question, on the preliminary form of application, as to whether he was willing to take up arms in defense of this country, the said Appellee answered: "No, (Seventh Day Adventist, non-combatant)."

[fol. 23] On preliminary examination the Appellee, then the Petitioner, stated to the Examiner that this answer was based on purely religious grounds. In his Selective Service

questionnaire he had claimed exemption from both combatant and non-combatant military service as a conscientious objector. At the time of the hearing before the Court the Naturalization Examiner recommended that the petition of said Appellee, James Louis Girouard, be denied.

A hearing was held before the Court on August 1, 1944, at which time the District Court Judge interrogated the Appellee, James Louis Girouard. No transcript of this examination was made, but it appears that the Appellee testified that he was a member of the Seventh Day Adventist sect, of whom he said there are apparently 10,000 serving in the armed forces of the United States as non-combatants, especially in the Medical Corps; and that he was willing to serve in the army as such non-combatant, but would not bear arms. The Court ordered him admitted to citizenship.

To this ruling a "notice of exception" was immediately filed with the Court by a representative of the United States Immigration and Naturalization Service, which the Judge ordered noted and instructed that same be filed. The ruling reads as follows:

> "That since the Selective Service and Training Act permits, as a matter of right, an applicant for the draft to express a willingness to serve in the armed forces of the United States, but as a non-combatant, then this petitioner by exercising that right is still a person who can take an unqualified oath of allegiance to the United States and is therefore eligible to citizenship."

To the said ruling a notice of appeal was duly filed, and the United States of America now designates the said ruling as the point on which it intends to rely on its appeal.

[fol. 24] Applicable Statute

Section 307A, Nationality Act of 1940; five years' residence in the United States; valid declaration of intention; good moral character for the period of his residence; and attachment to the principles of the United States Constitution.

Edmund J. Brandon, United States Attorney; Arthur J. B. Cartier, Assistant United States Attorney.

In United States District Court

Designation of Contents of Record on Appeal

Now comes Edmund J. Brandon, United States Attorney for the District of Massachusetts, for and on behalf of the United States of America, and for the purpose of prosecuting its appeal to the United States Circuit Court of Appeals for the First Circuit, requests the Clerk to prepare and forward to said United States Circuit Court for the First Circuit, a transcript which shall include the following:

1. Petition for Naturalization No. 264212 of James Louis Girouard.

2. Declaration of intention of James Louis Girouard, No. 292626.

3. Preliminary form for petition for naturalization No. 264212 of said James Louis Girouard.

4. Sworn statement of James Louis Girouard dated March 9, 1943, and bearing number 1500-D-292626.

4(a). Order of Court.

5. Record of Selective Service Local Board No. 161, Winchester, Massachusetts, of James Louis Girouard, dated November 3, 1943, and executed by the Clerk, George W. Hayden.

[fol. 25] 6. Notice of exception which the Court instructed the Clerk to file containing the Court's ruling.

7. Statement of Points on which Appellant intends to rely on appeal.

8. Designation of Contents of Record on Appeal.

9. Statement in Narrative Form of Petitioner's Testimony before the Court, in accordance with Rule 75(c).

Edmund J. Brandon, United States Attorney; Arthur J. B. Cartier, Assistant United States Attorney.

Clerk's Certificate to foregoing transcript omitted in printing.

[Memorandum. An order of enlargement of time for docketing case to, and including, January 15, 1945, is here omitted. A. I. Charron, Clerk.]

[fol. 26] PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On April 3, 1945, this case came on to be heard, and was fully heard by the Court, Honorable John C. Mahoney and Honorable Peter Woodbury, Circuit Judges, and Honorable Arthur D. Healey, District Judge, sitting.

Thereafter, to wit, on the first day of June, A. D. 1945, the following opinion of the Court and dissenting opinion were filed:

[fol. 27] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1944

No. 4058

UNITED STATES OF AMERICA, Appellant,

v.

JAMES LOUIS GIROUARD, Appellee

Appeal from the District Court of the United States for the District of Massachusetts

Before Mahoney, Woodbury and Healey, J.J.

Edmund J. Brandon, United States Attorney.

Arthur J. B. Cartier, Assistant U. S. Attorney, for Appellant.

David J. Coddaire, William J. Fitzsimons, for Appellee.

OPINION OF THE COURT—June 1, 1945

MAHONEY, J.:

The question here is whether a conscientious objector who is willing to serve as a noncombatant in the armed forces of the United States but unwilling to bear arms in its defense may be admitted to citizenship.

The appellee was born in Canada in 1902 and came to this country in 1923. In his declaration of intention to become a citizen of the United States, which he filed in the District Court at Boston on August 8, 1940, he described himself as [fol. 28] an engineer with residence at Stoneham, Massachusetts, where he lives with his wife and daughter. He stated on the preliminary form of petition for naturalization that he understood the principles of the government of the

United States, believed in its form of government and was willing to take the oath of allegiance in the following form:

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So Help Me God."

His answer to the question "If necessary, are you willing to take up arms in defense of this country?"—was "No (non combatant) Seventh Day Adventist". He is of good moral character, well disposed to the good order and happiness of the United States and is not affiliated with any organization opposed to organized government. In a sworn statement before the Acting Naturalization Examiner on March 9, 1943, he stated that it was a purely religious matter with him, and in a questionnaire filed with Local Draft Board No. 161 he claimed exemption from combatant or non-combatant military service as a conscientious objector. At a hearing before the District Court all this evidence was submitted together with the testimony of the appellee that he was a member of the Seventh Day Adventist sect. He said that there were about ten thousand of this sect serving in the armed forces of the United States as non-combatants, especially in the medical corps; and that he was willing to serve in the army as a non-combatant but would not bear arms. The court admitted him to citizenship and entered the following order: "That since the Selective Service and [fol. 29] Training Act permits, as a matter of right, an applicant for the draft to express a willingness to serve in the armed forces of the United States, but as a non-combatant, then this petitioner by exercising that right is still a person who can take an unqualified oath of allegiance to the United States, and is therefore eligible to citizenship." We think that the lower court was in error.

Naturalization is a privilege which is offered to any alien who desires to become a citizen, but it is a privilege subject to conditions which have been prescribed by Congress and

with which the petitioner for citizenship must strictly comply. Congress is empowered by the Constitution to provide for the naturalization of aliens and the fact that it has always thought that naturalization is to be granted only after great care and consideration is evidenced by an examination of the strict requirements which it has declared the petitioner must meet. Among the conditions which he must fulfill and the obligations which he must undertake are those contained in the oath of allegiance which he takes before being admitted to citizenship.

The Supreme Court has interpreted that oath to mean that the petitioner is willing to bear arms in defense of this country and unless he takes an oath so interpreted the petition is to be dismissed and the privilege of citizenship denied. In *United States* v. *Schwimmer*, 279 U. S. 644, 651 (1929) the applicant for citizenship was a woman born in Hungary. Her preliminary examination showed that she was an uncompromising pacifist with no sense of nationalism, "only a cosmic consciousness of belonging to the human family". She was a linguist, lecturer and writer, well educated and accustomed to discuss government and civic affairs. She was opposed to undemocratic institutions and wanted to become a citizen of a country whose principles were in harmony with her ideals but was not willing to take up arms in its defense. The Court in reversing the Circuit [fol. 30] Court of Appeals and affirming the District Court, which had denied her petition, said:

"That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution.

"Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government. And their opinions and beliefs as well as their behavior indicating a disposition to hinder in the performance of that duty are subjects of inquiry under the statutory provisions governing naturalization and are of vital importance, for if all or a large number of citizens oppose such defense the 'good order and happiness' of the United States can not long endure. And it is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. The influence of conscientious objectors against the use of military force in defense of the principles

of our Government is apt to be more detrimental than their mere refusal to bear arms. The fact that, by reason of sex, age or other cause, they may be unfit to serve does not lessen their purpose or power to influence others."

The case of *United States* v. *Macintosh*, 283 U. S. 605, followed in 1931. There the petitioner for naturalization came to this country from Canada. He was a Baptist minister and a member of the faculty of the Divinity School at Yale University. In the first World War he was a chaplain with the Canadian Army and served with the American Y.M.C.A. He stated that he was willing to take the prescribed oath but that he was not willing to take up arms unless he believed that the war was morally justified; that his first allegiance was to the will of God; and that "he could not put allegiance to the government of any country before allegiance to the will of God." Here, too, the Supreme Court reversed the Circuit Court of Appeals and affirmed the District Court's action in dismissing the petition. It held:

[fol. 31] "* * * The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. The alien, when he becomes a naturalized citizen, acquires, with one exception, every right possessed under the Constitution by those citizens who are native born (*Luria* v. *United States*, 231 U. S. 9, 22); but he acquires no more. The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. * * *

"When he speaks of putting his allegiance to the will of God above his allegiance to the government, it is evident, in the light of his entire statement, that he means to make

his own interpretation of the will of God the decisive test which shall conclude the government and stay its hand. We are a Christian people (*Holy Trinity Church* v. *United States*, 143 U. S. 457, 470-471) according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. But, also, we are a Nation with the duty to survive; a Nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God."

United States v. *Bland*, 283 U. S. 636 (1931) was decided at the same time as the *Macintosh* case. There the applicant for citizenship was a native of Canada who had served this country as a nurse in the first World War. She refused to bear arms in defense of the United States under [fol. 32] any circumstances and was unwilling to take the oath unless the words "as far as my conscience as a Christian will allow" were written into it. Again the Supreme Court reversed the Circuit Court of Appeals and sustained the District Court's dismissal of the application. It rendered its decision in accordance with the opinion in the *Macintosh* case and said that "The words of the statute do not admit of the qualification upon which the applicant insists."

It is true that these decisions were by a divided court but until they are overruled by the court itself or Congress enacts legislation which gives to the oath a meaning contrary to the interpretation placed upon it by the court, we are bound to accept the law as promulgated by these decisions. The facts in the instant case bring it squarely within the principles of these cases.

The District Court, however, took the view that any person subject to the draft who by reason of religious training or belief is conscientiously opposed to war may state his willingness to serve in the armed forces but as a non-combatant under § 305(g) of the Selective Training and Service Act of 1940 (54 Stat. 887, 50 U. S. C. A. War Appendix § 301 *et seq.*) and is entitled to take the oath. But the permission given to a conscientious objector; alien as well as citizen, to express his willingness to serve in the armed forces of the United States as a non-combatant, does not mean that

the applicant for citizenship is not required to take an oath to bear arms in defense of this country. The naturalization laws make certain requirements of the applicant for citizenship and the consideration given to him as a draftee under the Selective Training and Service Act does not lessen those requirements.

When Congress passed the Nationality Act of 1940 (54 Stat. 1137, 8 U. S. C. A. §§ 501 *et seq.*) it reenacted the same oath of allegiance and did not change in any way the interpretation placed upon it by the Supreme Court. However, [fol. 33] by an amendment to that Act in 1942 (56 Stat. 182, 183; 8 U. S. C. A. §§ 1001, 1004) it excused "any person not a citizen, regardless of age, who has served or who hereafter serves honorably in the military or naval forces of the United States during the present war" and who has been lawfully admitted to the United States, from filing a declaration of intention, and from the residence and educational requirements. No change was made in the oath of allegiance. It was also stated that the provisions of the amendment shall not apply "to any conscientious objector who performed no military duty whatever or refused to wear the uniform".

In *In re Kinloch*, 53 F. Supp. 521, two British subjects applied for citizenship. They were classified as conscientious objectors for non-combatant service. At the time of their applications they were members of a medical unit of the army. The court granted their applications and admitted them to citizenship. It reasoned that by Congressional enactment it was provided that these and similarly situated applicants were entitled to citizenship by virtue of becoming members of the armed forces of the United States. It stated that to require them to take an oath which means that they are willing to bear arms would destroy the purpose of the amendment and make it meaningless.

Since the appellee has not served in the armed forces he is definitely denied the benefits of this amendment. But it is urged that the amendment has inferentially changed the meaning of the oath of allegiance as promulgated in the *Schwimmer*, *Macintosh* and *Bland* cases and any conscientious objector may become a citizen by taking an oath which does not mean that he is willing to bear arms.

Congress, we think, in passing this amendment, intended to reward the conscientious objectors who had served or were serving in the armed forces by allowing them to take

an oath which did not conflict with their religious scruples. [fol. 34] It has passed no legislation expressly changing the meaning as interpreted by the Supreme Court, and we do not believe that it intended to extend this reward beyond this particular group. We do not think that it meant to give the benefit of such an inferential change in the meaning of the oath of allegiance to any alien conscientious objector who like the appellee here has not served and is not serving in the armed forces, or to conscientious objectors opposed to participate in non-combatant service who have been assigned to work of national importance under civilian direction. Since the petitioner is not willing to bear arms in defense of the United States, his petition must be denied.

The order of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

WOODBURY, J. (dissenting):

I think the order of the District Court should be affirmed.

The inclusion in the preliminary application for naturalization of the question with respect to willingness to take up arms in defense of this country rested originally upon administrative, not legislative, action. Congress in §§ 4, 7, and 8 of the Naturalization Act of 1906 (34 Stat. 596) in specifying the requirements for admission to citizenship by naturalization did not see fit to include one calling for a statement of willingness to take human life in defense of the United States. Nevertheless a majority of the Supreme Court in the *Schwimmer*, *Macintosh*, and *Bland* cases found such a requirement in the provision of § 4 *Third* of the Act of 1906, now § 335 (a) (3), (4) of the Nationality Act of 1940, (54 Stat. 1157; 8 U. S. C. § 735 (a) (3), (4)) which provides that an alien applicant for citizenship must before admission declare on oath in open court that he will "support and defend the Constitution and laws of the United [fol. 35] States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." The majority took the view that a pacifist could not take an oath couched in the terms quoted without mental reservation.

Following these decisions Congress passed the Nationality Act of 1940 (54 Stat. 1137) "To revise and codify the nationality laws of the United States into a comprehensive nationality code." By it Congress did not alter the terms

of the oath of allegiance and so by inference it might be said to have adopted the interpretation placed upon the oath by the Supreme Court in the cases just referred to. But this inference seems to me to lose persuasive force by reason of the fact that Congress in its revision and codification did not include, when adding many new requirements for eligibility to citizenship by naturalization, a specific one of willingness to bear arms, but instead permitted that requirement still to stand on an interpretation of the oath of allegiance by a closely divided court. It seems to me in consequence that no persuasive inference of Congressional adoption of the judicial interpretation of the oath of allegiance in the *Schwimmer*, *Macintosh* and *Bland* cases can safely be drawn from the Nationality Act of 1940. It seems to me that the permissible inferences from that statute neutralize one another.

Then I find in the amendment of the above act passed on March 27, 1942, (56 Stat. 182, 183) positive evidence that Congress has changed the interpretation put upon the oath of allegiance by the Supreme Court in the *Schwimmer*, *Macintosh* and *Bland* cases to the extent of making it possible for persons who share the petitioner's religious scruples to take it without mental reservation. By the amendment a new title was added to the 1940 Act, the effect of which is to simplify and expedite naturalization for "any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces [fol. 36] of the United States during the present war," (and who has been lawfully admitted) by excusing such persons from filing a declaration of intention to become a citizen and relieving them of the residence and educational requirements. It is true that the petitioner cannot take advantage of the special provisions of this amendment because he has not served in the military or naval forces. He is not trying to. But it applies to any person with service therein and therefore it applies to those with service in a non-combatant, as well as to those with service in a combatant capacity. *In re Kinloch*, 53 F. Supp. 521. Certainly it cannot be said that one in the medical corps of the army or the hospital corps of the navy is not serving respectively "in the military or naval forces of the United States." Thus the amendment applies to those who share the petitioner's scruples, if they have been called upon and have served in a capacity permitted by their scruples.

and, since the amendment does not change the oath of allegiance, it would seem to follow that Congress has by necessary implication expressed its intention that one who believes as the petitioner does can take that oath without reservation. It would be strangely inconsistent if Congress permitted conscientious objectors to elect service in a non combatant capacity, gave persons so serving, if aliens, advantages in obtaining citizenship by naturalization, and then required them to take an oath actually to bear arms in defense of the United States.

The interpretation placed upon this amendment by my associates seems to me to accord to Congress an intention to have the words of the oath mean one thing to a person who is willing to serve and has served in the military forces to the extent permitted by his scruples, and something else to one equally willing to serve but who for reasons of age, sex, dependency or physical unfitness has not been called upon or permitted to do so. I think Congress must have intended the words of the oath to mean the same thing to [fol. 37] one who has served in the military or naval forces as they do to one who has not.

I would even be willing myself to go further and affirm the order of the court below on a still broader ground. I would be willing to recognize frankly that the case at bar is ruled in principal by the *Schwimmer*, *Macintosh* and *Bland* cases, but decline to follow them.

In taking this course I recognize my duty as an inferior federal judge to accept and follow controlling decisions of the Supreme Court of the United States whether I personally agree with those decisions or whether I do not. I fully appreciate that federal law would soon become chaotic if judges such as I should do otherwise. But I do not believe that as a consequence of this we on this court are under a positive duty always to follow blindly.

Like all appellate courts I conceive it to be our judicial duty to decide cases as we think they should be decided, but as an intermediate appellate court one of the factors and a highly important one, for us to take into consideration in concluding how we should decide a case is the view which we think the Supreme Court would take on the question at issue before us. Nothing is to be gained by our deciding a question contrary to the way we think the Supreme Court would decide it. And to determine how the Supreme Court would decide a question we ordinarily would follow and

apply unreversed decisions of that court in point. But as Judge Parker said in *Barnette* v. *West Virginia State Board of Education*, 47 F. Supp. 251, 253, "decisions are but evidences of the law and not the law itself," and although I frankly concede that in the vast majority of cases decisions of the Supreme Court constitute so far as we are concerned conclusive "evidences of the law," nevertheless on rare occasions, and I think this is one of them, situations arise when in the exercise to the best of our ability of the duty to prophesy thrust upon us by our position in the federal judi-
[fol. 38] cial system we must conclude that dissenting opinions of the past express the law of today. When this situation arises and we do not agree with decisions of the Supreme Court I think it our duty to decline to follow such decisions and instead to follow reasoning with which we agree. As I see it this is the situation which confronts us here.

Fundamentally the question presented is one of statutory construction. It is whether Congress, as a condition of admission to citizenship by naturalization, requires an applicant to state under oath that he is willing actually to take up arms in defense of this country. In other words, is it the Congressional will that aliens otherwise qualified be denied admission to citizenship if conscientiously opposed to taking life in war?

As already appears the Supreme Court has three times answered this question in the affirmative. But in the *Schwimmer* case, Mr. Justice Holmes, speaking for himself and Mr. Justice Brandeis, dissented on the ground that the applicant, being a woman over fifty years of age, "would not be allowed to bear arms if she wanted to," and for the further reason that he could not see that a belief in pacifism made it impossible to subscribe wholeheartedly to the oath required. Mr. Justice Sanford, who also dissented, agreed in substance with the views of the Circuit Court of Appeals (27 F. (2d) 742) which can be summarized by the quotation "A petitioner's rights are not to be determined by putting conundrums to her."

In the next case in which the Supreme Court considered the question, *United States* v. *Macintosh*, 283 U. S. 605, Mr. Chief Justice Hughes, and Associate Justices Holmes, Brandeis, and Stone dissented. Speaking through the then Chief Justice, the dissenters conceded that naturalization is a privilege which Congress could grant or withhold on

such conditions as it might impose; that Congress could constitutionally compel service in the armed forces by whom-[fol. 39] soever it might select regardless of religious scruples, and from this they were willing to assume that Congress had authority to exact a promise to bear arms as a condition to its grant of naturalization. But they did not find evidence in the statute indicating that Congress had exacted such a promise. They noted the omission from the statute of any express requirement of a promise to bear arms, said that the question "is whether that exaction is to be implied from certain general words" which they did not think "either literally or, historically, demand the implication," and then said: "If such a promise is to be demanded, contrary to principles which have been respected as fundamental, the Congress should exact it in unequivocal terms, and we should not, by judicial decisions, attempt to perform * * * a legislative function."

In detail the dissenting Justices reasoned thus: On examining the statute they found certain specific requirements with regard to the opinions and conduct of applicants for citizenship but among them found none "to the effect that one shall not be naturalized if by reason of his religious convictions he is opposed to war or is unwilling to promise to bear arms." They considered this omission "highly significant." Next they examined the facts, and from that examination concluded that the petitioner had fully satisfied all the specific statutory requirements, and then they said that "The principal ground for exclusion appears to relate to the terms of the oath which the applicant must take." They said: "The question then is whether the terms of the oath are to be taken as necessarily implying an assurance of willingness to bear arms, so that one whose conscientious convictions or belief of supreme allegiance to the will of God will not permit him to make such an absolute promise, cannot take the oath and hence is disqualified for admission to citizenship."

[fol. 40] The dissenting Justices then compared the wording of the oath of allegiance with the wording of the oath prescribed by Congress under Art. VI, 3 of the Constitution for civil officers generally (except the President), found the terms of the oaths substantially similar, said that it went without saying that it was not the intent of Congress in framing the latter oath to impose any religious test; and found "it impossible to conclude," in view of the

history of the struggle for religious liberty, that Congress intended that persons with religious scruples against bearing arms should be disqualified from holding public office. Next the Justices noted that "There are other and most important methods of defense, even in time of war, apart from the personal bearing of arms," and that "a promise to engage in war by bearing arms, or thus to engage in a war believed to be unjust, would be contrary to the tenets of religious groups among our citizens who are of patriotic purpose and exemplary conduct." The dissenting opinion then continues as follows:

"To conclude that the general oath of office is to be interpreted as disregarding the religious scruples of these citizens and as disqualifying them for office because they could not take the oath with such an interpretation would, I believe, be generally regarded as contrary not only to the specific intent of the Congress but as repugnant to the fundamental principle of representative government.

"But the naturalization oath is in substantially the same terms as the oath of office to which I have referred. I find no ground for saying that these words are to be interpreted differently in the two cases. On the contrary, when the Congress reproduced the historic words of the oath of office in the naturalization oath, I should suppose that, according to familiar rules of interpretation, they should be deemed to carry the same significance."

Following this the dissenting Justices noted that the policy of granting exemptions from military service to conscientious objectors had been consistently followed since [fol. 41] colonial times,[1] and said that "the long-established practice of excusing from military service those whose religious convictions oppose it confirms the view that the Congress in the terms of the oath did not intend to require a promise to give such service." Next the dissenters admitted "that duty to the State exists within the domain of power, for government may enforce obedience to laws regardless of scruples. When one's belief collides with the power of the State, the latter is supreme within

[1] For a citation of authorities supporting this proposition see the opinion of the Circuit Court of Appeals in the *Macintosh* case, 42 F. (2d) 845, 847, 848.

its sphere and submission of punishment follows." "But," they said, "in the forum of conscience, duty to a moral power higher than the State has always been maintained," and "There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power." They found no ground for excluding Macintosh from admission to citizenship because his conscientious scruples had reference only to wars which he himself believed to be unjust, and they concluded by expressing the view that the *Schwimmer* case stood upon its own special facts and that the judgment therein did not require reversal in the case they were considering.

No discussion of importance is contained in the dissenting opinion filed in the third case of the trilogy, *United States* v. *Bland*, 283 U. S. 636, decided contemporaneously with the *Macintosh* case.[2] In it the Supreme Court divided in the same way that it did in the *Macintosh* case and for the reasons therein expressed.

[fol. 42] If I were to decide the question of law before us here *de novo* I would be disposed to follow the reasoning of the dissenting opinions in the *Schwimmer*, *Macintosh* and *Bland* cases and the decisions of the circuit courts of appeals reversed therein.[2] In the absence of an express statutory provision I find it hard to believe that Congress intended to deny citizenship by naturalization to members of sects such as the Quakers (and I think the same may be said of Seventh Day Adventists) who, as Mr. Justice Holmes observed in his dissent in the *Schwimmer* case, "have done their share to make the country what it is." It seems to me that interpreting the oath of allegiance in its historical setting, in connection with other statutes, and in conformity with the First Amendment, Congress did not intend in it to exact an unconditional promise actually to bear arms in war, but instead intended to exact a promise to support and defend the Constitution and laws of the United States in whatever [illegible] by such means as are

[2] 27 F. (2d) 742; 42 F. (2d) 845; 52 F. (2d) 812.

appropriate to an applicant's sex, age, and capabilities, and are not in violation of an applicant's religious scruples or beliefs in so far as those scruples or beliefs are either protected by the Constitution or have been consistently respected by Congress. However, the three celebrated cases above have not been overruled, and since in principle they rule the case at bar, I would probably feel compelled to follow them were it not for my view that now the Supreme Court itself would not do so.

I concede that the indications of reversal are not as strong here as they were in the second flag salute case, *Barnette* v. *West Virginia State Board of Education*, 47 F. Supp. 251. But as already appears decisions of circuit courts of appeals were reversed by a divided Supreme Court in the *Schwimmer*, *Macintosh* and *Bland* cases, and in the two latter, the ones most nearly in point, by the narrowest [fol. 43] margin, and the decisions reversed were fully, and I think convincingly reasoned and were unanimous. Thus there is a substantial body of judicial opinion opposed to that of the majority in the above cases. In view of this substantial body of opinion, in view of what I believe to be the intrinsic merit of that opinion, and in view of the many recent decisions of the Supreme Court giving broad definition to the scope of the guarantee of the free exercise of religion contained in the First Amendment,[3] I believe that the prediction can be ventured that the above cases are no longer expressive of the law. And I believe that this prediction can be ventured even resisting the temptation "to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant." Learned Hand dissenting, *Spector Motor Service* v. *Walsh*, 139 F. (2d) 809, 823. Therefore I feel that we are not constrained to follow the Supreme Court cases cited last above.

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[3] *Cantwell* v. *Connecticut*, 310 U. S. 296; *Jones* v. *Opelika*, 316 U. S. 584; reversed on rehearing, 319 U. S. 103; *Jamison* v. *Texas*, 318 U. S. 413; *Murdock* v. *Pennsylvania*, 319 U. S. 105; *Martin* v. *Struthers*, 319 U. S. 141; *Taylor* v. *Mississippi*, 319 U. S. 583; *Board of Education* v. *Barnette*, 319 U. S. 624; *Follett* v. *McCormick*, 321 U. S. 573.

On the same day, to wit, June 1, 1945, the following judgment was entered:

JUDGMENT—June 1, 1945

This cause came on to be heard April 3, 1945, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

[fol. 44] PROCEEDINGS IN CIRCUIT COURT OF APPEALS

Upon consideration whereof, It is now, to wit, June 1, 1945, here ordered, adjudged and decreed as follows: The order of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the Court, (S.) Arthur J. Charron, Clerk.

Thereafter, to wit, on June 18, 1945, mandate was stayed until further order of court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 45] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. ——

JAMES LOUIS GIROUARD, Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing a petition for certiorari in the above entitled cause be, and the same is hereby, extended to and including October 30th, 1945.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 27th day of August, 1945.

[fol. 46] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 10, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Endorsed on Cover: File No. 56275. U. S. Circuit Court of Appeals, First Circuit. Term No. 572. James Louis Girouard, Petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed October 30, 1945. Term No. 572 O. T. 1945.

OCT 30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 572

JAMES LOUIS GIROUARD,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

HOMER CUMMINGS,
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Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 572

JAMES LOUIS GIROUARD,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

James Louis Girouard, your petitioner, prays that a writ of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the First Circuit, reversing an order of the United States District Court for the District of Massachusetts.

Opinions Below

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 26) and the dissenting opinion of Judge Woodbury (R. 32) are reported in 149 F. 2d 760.

Jurisdiction

The judgment of the Circuit Court of Appeals sought to be reviewed was entered June 1, 1945 (R. 40). By order of Mr. Justice Black August 27, 1945, the time within which to file petition for certiorari was extended to October 30, 1945 (R. 40). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

Whether, in view of amendments to the Nationality Act of 1940 expressly recognizing the right of conscientious objectors who have served in the armed forces to naturalization upon the taking of the oath prescribed by statute, while retaining religious scruples against bearing of arms—Whether the requirements of that same oath by implication debar from naturalization an alien who acknowledges the plenary authority of Congress to declare war, who reserves to himself no right to determine the rightness of war once Congress has spoken, and who acknowledges a duty as a citizen, and is willing, to serve in the armed forces of the United States in places of risk and the greatest danger as has been exemplified by thousands of his co-religionists but who is, by reason of religious scruples against the taking of human life, unwilling to bear arms.

Statutes Involved

The pertinent provisions of the Nationality Act of 1940 and amendments thereto are printed in the Appendix, p. 20.

Statement

The petitioner, a native of Canada, entered this country in 1923 and has resided here ever since (R. 5). On August

8, 1940, he filed a declaration of intention to become a citizen of the United States (R. 2) and on November 3, 1943, he filed in the United States District Court for the District of Massachusetts his petition for naturalization (R. 9).

Petitioner stated in the Preliminary Form for Petition for Naturalization filed by him January 26, 1943 (R. 4), that he understood the principles of the government of the United States, believed in its form of government and was willing to take the oath of allegiance in the following form (R. 7):

> "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God."

Question 26 in the Preliminary Form and the petitioner's answer thereto were (R. 7):

> "If necessary, are you willing to take up arms in defense of the country? No (Non-combatant) Seventh Day Adventist."

In sworn testimony before the Acting Naturalization Examiner on March 9, 1943, the petitioner explained the above answer to question 26 by saying (R. 19):

> "* * * it is purely a religious matter with me, I have no political or personal reasons other than that."

At a hearing held before the District Court on August 1, 1944 and on interrogation by the District Court Judge, the

petitioner testified that he was a member of the Seventh Day Adventist Denomination of whom approximately 10,000 were then serving in the armed forces of the United States as non-combatants, especially in the Medical Corps; and that he was willing to serve in the army but would not bear arms (R. 23).[1]

Disregarding the recommendation of the Naturalization Examiner that the petition be denied, the District Court on August 1, 1944, entered its order directing that the petitioner be admitted to citizenship (R. 14).

At the same term, on August 25, 1944, a representative of the United States Immigration and Naturalization Service filed a notice of exception (R. 18). From the order of Court admitting petitioner to citizenship, entered on August 1, 1944, the United States appealed (R. 22).

The opinion of the Circuit Court of Appeals held that the case is controlled by *United States* v. *Schwimmer*, 279 U. S. 644 (1929); *United States* v. *Macintosh*, 283 U. S. 605 (1931); *United States* v. *Bland*, 283 U. S. 636 (1931), and that under those decisions the statutory oath of allegiance can not be taken by a person who, while willing unqualifiedly to do all else in defense of the country including service in the military forces, is unwilling actually to bear arms in its defense (R. 28-32). The dissenting opinion of Judge Woodbury asserts that by the amendment of March 27, 1942, 56 Stat. 182, 183, Congress, although it did not change the section of the Nationality Act prescribing the

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[1] In an inquiry form transmitted November 3, 1943 by the Naturalization Service and returned by the clerk of the petitioner's draft board there appears the statement (R. 21): "* * * that in Series X, page 6, the registrant did claim exemption from combatant or noncombatant military service as a conscientious objector; that if he did so claim, he has filed with this Board a 'Special Form for Conscientious Objectors (Form 47) * * *.'" Due apparently to the equivocal form of this questionnaire and the failure of the Government to introduce Form 47, neither of the courts below referred to, or gave any weight to, this draft board return.

oath, nevertheless evidenced a change in the interpretation placed upon the oath by this Court (*In re Kinloch*, 53 F. Supp. 521 (W. D. Wash. 1944)) and the majority recognized that to give the amendment any meaning it must be interpreted as permitting conscientious objectors who are veterans to take the oath despite their religious scruples against bearing arms (R. 31-32). The dissenting opinion also points out that Congress should not be deemed to have intended to have the words of the same oath mean one thing to a conscientious objector who has served in the military forces and something else to one who is willing so to serve (R. 34). And the dissent concludes that the district court judgment should be affirmed on another ground as well: That the *Schwimmer*, *Macintosh* and *Bland* cases are no longer the law.

Accordingly the Circuit Court of Appeals by a 2-1 vote reversed the judgment of the district court (R. 40).

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that the oath of allegiance prescribed in the Nationality Act of 1940 as amended impliedly requires willingness to bear arms as a condition to naturalization.

2. In failing to hold that the 1942 amendments to the Nationality Act of 1940 negative any implied requirement of willingness to bear arms as a condition to naturalization.

3. In holding that the statutory requirements for naturalization were not satisfied because of petitioner's statement of his unwillingness to bear arms.

Reasons for Granting the Writ

1. The decision of the court below is probably in conflict with the decisions of this Court.—Although it relied upon the

decisions of this Court in *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605; *United States* v. *Bland*, 283 U. S. 636, and purported to follow them, the court below has improperly extended those decisions beyond the precise questions therein decided and erroneously held that they control the instant case involving materially different facts. In those cases the statutory oath of allegiance required as a condition to naturalization was held to bar the applicants because statements in the preliminary forms for petition for naturalization and on hearing were deemed to indicate lack of ability, without unpermissible mental or written reservation, to take the required oath "to support and defend the Constitution and laws of the United States against all enemies, foreign and domestic * * *" and as well were deemed inadequate to satisfy that the applicant was "attached to the principles of the Constitution." Those cases, however, were decided on facts quite different from those presented in the instant case and involved applicants whose asserted rights of conscience if recognized would have imposed serious limitations on the war power of Congress and in effect and tendency constituted much greater threats to the untrammeled exercise of that power.

Here it merely appears that petitioner, because of his religious scruples against the taking of human life, is unwilling to bear arms in the technical sense of the word. So far as appears, he recognizes that under the war power, once Congress has spoken, its decision in making war is final and must, of necessity, be binding on all. He is willing to serve in the armed forces of the United States in whatever capacity may be required as have served thousands of his co-religionists. Petitioner asserts no right to question the moral rightness of any particular war, nor does he debate the finality and necessarily binding effect on him

of the decision of Congress. Neither does he seek to reserve to himself determination of the extent or manner in which he shall assist in the defense of the country; his willingness to support the Government in time of war is unequivocal. His sole limitation is that as a matter of religious belief he cannot take human life and in that sense cannot bear arms. As has been abundantly exemplified in the present war, the attitude of such persons in no way tends to influence others against the use of military force. On the contrary the history of this war has again established that in the medical corps, in the hospital corps, and in other branches of the military forces they have by their fearless conduct and indifference to danger in succor of others inspired and fortified all in the stress of battle.

The facts and reasoning in the cases cited by the court below (R. 28-30) make it plain that they have erroneously been held controlling in the instant case.

In *United States* v. *Schwimmer*, 279 U. S. 644, the court laid emphasis on the fact that "Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country's defense detracts from the strength and safety of the Government. * * * The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms" (p. 651).

The decision turned upon the conclusion that the evidence as to the applicant "justifies belief that she may be opposed to the use of military force as contemplated by our Constitution and laws and her testimony clearly suggests that she is disposed to assert her power to influence others to such opposition" (p. 652). The scope of that opinion is also indicated by its specific reference (p. 652) to conscientious objectors in the last war "who were unwilling to

bear arms in that crisis and who refused to obey the laws of the United States and the lawful commands of its officers and encouraged such disobedience in others. * * * and * * * made claim because of conscience for *exemption from any form of military service* * * *." (Emphasis supplied.)

Plainly this Court there dealt with an applicant who not only had personal scruples of conscience against the taking of human life but who claimed a right to propagandize against and induce others to oppose use of force in defense of the country, and refused to recognize the "reciprocal obligation of the citizen to render military service," *Selective Draft Law Cases*, 245 U. S. 366, 378 (pp. 650, 652). No question of religious belief was involved.

In contrast, the applicant here, like his co-religionists, has emphasized a willingness to serve in the military forces so long as he is not compelled as a combatant to take human life and there is no showing of purpose or disposition on his part to influence others. The *Schwimmer* case thus falls far short of requiring denial of the application of the petitioner here involved.

In the case of *United States* v. *Macintosh*, 283 U. S. 605, the applicant had no religious scruples against the taking of human life or against bearing arms in defense of the country and he expressly stated that he was willing to bear arms (p. 617). There the disqualification rested upon the entirely distinct ground, not at all present here, that the applicant sought to reserve to himself the right to determine the moral justice of any war despite the decision of Congress. There the evidence as to the applicant showed, as this Court said (p. 619):

> "that he will not assist in the defense of the country by force of arms or give any war his moral support unless he believes it to be morally justified, however necessary the war might seem to the government of the

> day; that he will hold himself free to judge of the morality and necessity of the war, and while he does not anticipate engaging in propagandizing against the prosecution of a war declared and considered justified by the Government, he prefers to make no promise even as to that; and that he is convinced that the individual citizen should have the right to withhold his military services when his best moral judgment impels him to do so."

and this Court summarized the applicant's position (p. 624):

> "In fact, he offers to take the oath of allegiance only with the qualification that the question whether the war is necessary or morally justified must, so far as his support is concerned, be conclusively determined by reference to his opinion."

The case of *United States* v. *Bland*, 283 U. S. 636, proceeded on substantially the same facts and grounds. As the court said (p. 636):

> "The only difference between the position she (Bland) took, and that taken by the respondent in the *Macintosh* case, is that in addition to refusing positively to bear arms in defense of the United States under any circumstances, she required an actual amendment of the oath as already stated. As was said in the *Macintosh* case, this is a circumstance which has no distinguishing effect."

Obviously, there is nothing in the record that brings the instant petition within the *Macintosh* or *Bland* cases. Petitioner has indicated not the slightest hesitation to accept the expressed will of the Government nor a lack of willingness at all times to support and defend the Government and in every way to further, and in no way hinder, by propaganda or otherwise, the successful prosecution of war, whether he be within or without the armed forces of the nation, save that he will not actually bear arms as a com-

batant since that would necessarily involve obligation to take human life.[2]

Thus the cases relied on by the court below offered no basis for denial of naturalization to petitioner. On the contrary, they indicated that a mere religious scruple against bearing arms standing alone is not to be regarded as presenting an insurmountable barrier. One who, subject to his religious inhibition against taking human life, recognizes the plenary authority of Congress under the war power and reserves no right to hinder or impair any exercise of that power but is ready to risk his life in the military forces and in other ways to uphold the hands of the authorities surely is not to be classed with those who would subvert the defense of the Government upon their own judgment that a war is morally unjustified.

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[2] The non-combatant position of the Seventh Day Adventist Denomination has often been grossly misunderstood. This position is not anti-militarism, it is not pacifism, it is not conscientious objection to war as an instrument of governmental policy as that is ordinarily understood. Seventh Day Adventists do not condemn those who take part in war. On the contrary, as non-combatants they recognize, and have been outstanding in performance of, their duty to aid their government in every way in time of warfare, except by taking human life. They have donned the uniform of the soldier and except for actual bearing of arms have performed all the duties of soldiers. Even under fire, they have helped fortify positions; so also have they been foremost, often under fire, in rendering medical aid to the wounded and sick; and have been constant in all measures to protect human life. They have buried the dead, transported men and supplies; and, in aid of the war effort, have labored in the factories, the munitions plants, the mines, and the fields wherever the defense of the nation could best be served. The non-combatant is not a coward; he simply conscientiously and courageously objects to affirmative participation in the taking of human life; he dares, however, to assume any military risk necessary to save life.

[1] A Seventh Day Adventist non-combatant does not agitate against war. He recognizes that war is many times unavoidable in the preservation of the State. He does not arrogate to himself the prerogative of deciding whether the government is right or wrong in entering upon a war. He merely maintains an attitude and a conviction that war, whether right or wrong, whether justified or unjustified, whether of aggression or of defense, does not change his obligation of obedience to God.

Indeed, the language of the *Schwimmer* and *Macintosh* opinions, aside from the distinctions pointed out above, by inference strongly indicates that one who is willing to serve in the armed forces, although as a non-combatant, and there assume the risk of death in defense of the country, is not to be deemed lacking in the statutory qualifications for naturalization. The *Schwimmer* opinion cites as examples to be avoided those who "made claim because of conscience for exemption from any form of military service." The *Macintosh* case proceeds directly upon the ground, in part at least, that the applicant refused to recognize a duty to assume the risk of military service in defense of the country. The court there said (p. 624):

> "In *Jacobson* v. *Massachusetts*, 197 U. S. 11, 29, the court speaking of the liberties guaranteed to the individual by the Fourteenth Amendment said:
>
> > "* * * and yet he may be compelled by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.
>
> The applicant for naturalization here is unwilling to become a citizen with this understanding."

Here there is no question of petitioner's willingness to assume all the risks of a soldier in the contingency of war.[3]

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[3] In *In re Kimloch*, 53 F. Supp. 521, referring to the duties of a member of the Seventh Day Adventist Denomination as a non-combatant in the medical corps, the court said (pp. 522-523):

> "The commanding officer of the unit to which these applicants were attached was present in court, and testified that such unit was composed almost entirely of soldiers who qualified for combat service. He further testified that no distinction whatever was made as between these two applicants and other members of the unit, in the training,

2. **The basic premise upon which are based the decisions of this Court relied on below has been invalidated by subsequent legislation of Congress.**—Even if the *Schwimmer* and *Macintosh* cases be regarded as otherwise applicable, it is submitted that amendments to the Nationality Act in 1942 have vitiated their controlling effect. Admittedly the requirement of willingness to bear arms as a condition to the grant of naturalization is not specific either in the Naturalization Act of 1906 involved in the *Schwimmer* and *Macintosh* cases or in the substantially identical provisions

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qualifying, equipping, responsibilities and duties assigned to them. It was further made clear to the court that these applicants, as members of a medical unit, were required to and did take the basic training provided for such unit, and in all respects were soldiers assigned for duty in a medical unit of the Army in time of war.

"The court was further advised that by the terms of the Geneva Conference, officers and men who are a part of, and attached to hospital and medical units are prohibited from bearing arms.

"The evidence disclosed that the hazards incident to service in a detachment such as the applicants belonged to are equal to those of the combat units, since their duties require them in time of battle to be at the front lines, under fire, in order that they may expeditiously and effectively care for their companions who are casualties, and that the same high degree of valor and courage demanded of soldiers who are a part of the combat forces and bear arms is required of them in the discharge of their duties as soldiers.

. . . . . .

"The Selective Training and Service Act permitted all registrants thereunder to be classified for service as follows:

"1. General combatant service.

"2. Non-combatant service.

"3. Work of civilian importance in camps.

"Those who were inducted and classified as 1AO were required to take the oath of a soldier, to live the life of a soldier, to wear the uniform, to assume all the hazards and responsibilities of a soldier, except to bear arms, as well as have the rights and privileges of a soldier, both during the period of service and after honorable discharge."

of the Nationality Act of 1940 here pertinent which supplanted it (App'x, p. 20).[4]

The pertinent portions of the Naturalization Act of 1906, Section 4, subdivisions Third, and Fourth, 34 Stat. 596, 597-598, merely prescribed that:

(1) The applicant shall declare on oath

> "that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same."

(2) It shall be made to appear that for at least five years preceding the application—

> "he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same."

Taken together, the *Schwimmer* and the *Macintosh* cases proceed on the basic premise that the prescribed oath and required showing that the applicant is "attached to the principles of the Constitution" *implicitly* require assur-

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[4] Sec. 504 of the Nationality Act of 1940, Act of October 14, 1940, c. 876, 54 Stat. 1137, 1172, "to revise and codify the nationality laws of the United States into a comprehensive nationality code" repealed the pertinent portions of Section 4 of the Naturalization Act of 1906; but in prescribing the content of the oath of allegiance the Nationality Act of 1940, sec. 335(a) (8 U. S. C. sec. 735(a)) in substance reenacted Section 4 (Third) of the Naturalization Act of 1906, 34 Stat. 596, 597-598, and the Nationality Act of 1940 in specifying for the first time the precise wording of the oath, Section 335(b) (8 U. S. C. Sec. 735(b)) adopted the language theretofore prescribed by administrative regulation of the Bureau of Naturalization. The requirement as to showing that the applicant is "of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States" (Sec. 307(a) of the Nationality Act of 1940; 8 U. S. C. Sec. 707(a)) was taken almost verbatim from Section 4 (Fourth) of the Naturalization Act of 1906, 34 Stat. 596. The statutory language under consideration in the *Schwimmer* and *Macintosh* cases is in substance identical with that involved in the instant case.

ance of willingness to bear arms. The four-judge dissent written by Mr. Chief Justice Hughes in the *Macintosh* case carefully stated the precise question presented and went on the ground that neither the oath nor the required showing of attachment to the principles of the Constitution demands the implication attached to it by the majority opinion (283 U. S. 627, 629, 635).

The Congress by amendment in 1942 of the Nationality Act of 1940 has now made clear the correctness of the dissenting opinion and has confirmed that the statute requiring the oath and the showing of attachment to the principles of the Constitution does not by implication bar an alien applicant willing to serve in the military forces but retaining religious scruples against taking human life or bearing arms. By those amendments Congress twice in 1942 expressly recognized the eligibility for citizenship under the general law of one thus unwilling to bear arms in defense of the country. In the Second War Powers Act, March 27, 1942, c. 199, Sec. 1001, 56 Stat. 176, 182-183, the Nationality Act was amended to add a new Title III. Section 701 thereof with respect to aliens who served in the United States military or naval forces during World War II eliminates the requirements as to declaration of intention, period of residence, command of the English language, handwriting of signature, and fees (8 U. S. C. Supp. IV, sec. 1001; see App'x, p. 21).

Significantly, Section 704, part of the new Title III and added at the same time by the same section of the Second War Powers Act, provides (8 U. S. C. Supp. IV sec. 1004; see App'x p. 21):

> "The provisions of this title shall not apply to . . . (2) any conscientious objector who performed no military duty whatever or refused to wear the uniform . . ."

These amendments to the Nationality Act were accompanied by no amendment of Section 307 or of Section 335 of the Nationality Act of 1940 here under scrutiny and requiring attachment to the principles of the Constitution and prescribing the oath, respectively.

The necessary inference is that Congress intends that the oath of allegiance (Section 335) may be taken and the statutory showing of attachment to the principles of the Constitution (Section 307) may be satisfied despite refusal of applicants to state a willingness to bear arms. To hold the contrary would be to nullify the amendment. *In re Kinloch*, 53 F. Supp. 521, 523 (W. D. Wash. 1944); *In re Sawyer*, 59 F. Supp. 428 (Del. 1945). In these cases the court expressly overruled the contention of the United States that the applicants could not take the oath of allegiance because of their continuing religious convictions against bearing arms.

The interpretation by Congress of the statutory oath as not requiring willingness to bear arms is thus clear. And this same congressional purpose and interpretation was re-emphasized by the similar Act of December 7, 1942, c. 690, 56 Stat. 1041, adding Section 323a to the Nationality Act (8 U. S. C. Supp. IV sec. 723a; App'x, pp. 21-22). It too dispenses with certain of the ordinary prerequisites for naturalization as to a person who was a member of the military or naval forces during the Spanish-American War, the 1916-1917 Mexican Border troubles, or during World War I—

> "who is not an alien ineligible to citizenship, * * * who was not a conscientious objector who performed no military duty whatever or refused to wear the uniform * * *."

The obvious conclusion is that Congress thereby again recognized that despite his refusal to bear arms a con-

scientious objector satisfying the other conditions of the statute may properly take the oath of allegiance and be deemed to satisfy the requirements as to attachment to the principles of the Constitution.

True, petitioner cannot take advantage of the special provisions of these two amendments since he has never served in the armed forces. But he does not invoke those sections directly.

The important feature of the 1942 legislation is that Congress, without abrogation or modification of the statutory requirements as to oath and attachment to the principles of the Constitution has expressly recognized that such requirements may be fulfilled by an otherwise qualified alien applicant despite his religious conviction against bearing arms.

The majority opinion of the court below holds that a special dispensation as to the oath was by the 1942 amendment extended to the defined class despite the fact that such dispensation was not included among those specifically granted. Aside from the general rule of *expressio unius*, on principle the attempted reconcilement is invalid. As stated by Judge Woodbury in his dissent (R. 34):

> "The interpretation placed upon this amendment by my associates seems to me to accord to Congress an intention to have the words of the oath mean one thing to a person who is willing to serve and has served in the military forces to the extent permitted by his scruples, and something else to one equally willing to serve but who for reasons of age, sex, dependency or physical unfitness has not been called upon or permitted to do so. I think Congress must have intended the words of the oath to mean the same thing to one who has served in the military or naval forces as they do to one who has not."

Congress by the 1942 amendments has made it clear that the sections of the Nationality Act here in question and

their practically identical forerunners upon which the decisions in the *Schwimmer* and *Macintosh* cases were posited are not to be regarded as impliedly requiring as a condition of naturalization declaration by the applicant of willingness to bear arms. The scope of the intent attributed to Congress by the four dissenting judges in the *Macintosh* case, insofar, at least, as that decision may properly be regarded as controlling here, is confirmed. The question presented therefore requires reconsideration by this Court.

3. **The question of construction of the statute here involved is of great public importance and one which will frequently recur.**—In neither *United States* v. *Schwimmer*, 279 U. S. 644, nor *United States* v. *Macintosh*, 283 U. S. 605, was the decision unanimous. The dissent of Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Sanford in the first cited case and of Mr. Chief Justice Hughes, Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Stone in the *Macintosh* case recognize the broad importance of the issue and clearly indicate the finely balanced nature of the question even prior to the amendments more clearly disclosing congressional purpose. While the binding effect of these decisions has been unquestioned, comment has been preponderantly adverse with respect both to the *Schwimmer* case (see Notes (1929) 7 N. Y. U. L. Q. Rev. 157-159, (1930) 3 So. Calif. L. Rev. 224-225, (1929) 16 Va. L. Rev. 169-174; (1929) 9 B. U. L. Rev. 263-265, (1930) 5 Ind. L. J. 521-522, (1930) 28 Mich. L. Rev. 445) and to the *Macintosh* case (Kenneth Sears, Ernst Freund, Frederick Green, *United States* v. *Macintosh—A Symposium, Parts II-IV* (1931) 26 Ill. L. Rev. 375, 382-396; Note (1932) 16 Marq. L. Rev. 133-135; (1931) 11 B. U. L. Rev. 532, (1932) 2 Idaho L. J. 54). The validity of the reasoning of these cases is not unquestioned even now. See *In re Lasey*, 39 F. Supp. 37, 38 (E. D. Wash. 1941); and dissent in the instant case (R. 38-39).

The Seventh Day Adventist Denomination and other religious groups representing an appreciable and highly regarded segment of the population have thus been held to entertain beliefs which bar aliens from admission to citizenship. Nevertheless members of these groups have in their service in the Medical Corps of the Army and in the Hospital Corps of the Navy made a record of intrepid devotion to duty that is unexcelled.[5]

A number of cases have dealt with the question of the necessity of willingness to bear arms only insofar as aliens who have thus served in the armed forces are concerned, but they raise a preliminary question involved in the present case, *In re Nielsen*, 60 F. Supp. 240 (Dist of Col., 1945); *In re Sawyer*, 59 F. Supp. 428 (Del. 1945); *In re Kinloch*, 53 F. Supp. 521 (W. D. Wash. 1944). Because the question of the duty to bear arms is so recurrent in the naturalization of hundreds of aliens many of whom will have the highest claim for favorable consideration, this Court should now consider the effect of the 1942 legislation to reach an early and authoritative determination of the interpretation properly to be given to Sections 307(a) and 335 of the Nationality Act of 1940.

---

[5] Individual deeds of unusual heroism in our wars, particularly in World War II, have not been confined to combatants. Noncombatants too have performed acts of valor beyond the call of duty. For example, Private Desmond T. Doss, Lynchburg, Virginia, a member of the Seventh Day Adventist Church, won the Congressional Medal of Honor while serving in the Medical Corps of the Army during World War II. The award was made for courage in aiding wounded comrades during the fight on Okinawa, the citation reading that the medal holder's name "became a symbol for outstanding gallantry throughout the Seventy-seventh Infantry Division."

Conclusion

It is submitted that this petition for writ of certiorari should be granted.

Respectfully,

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October, 1945.

APPENDIX

The Nationality Act of 1940, October 14, 1940, c. 876, 54 Stat. 1137, 1142, 1157, provides:

> Sec. 307. (a) No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States [8 U. S. C. sec. 707(a)].
>
> Sec. 335. (a) A person who has petitioned for naturalization shall, before being admitted to citizenship, take an oath in open court * * * (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic, and (4) to bear true faith and allegiance to the same * * *
>
> (b) The oath prescribed by subsection (a) of this section which the petitioner for naturalization is required to take, shall be in the following form:
>
> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God. In acknowledgment whereof I have hereunto affixed my signature * * * [8 U. S. C. sec. 735].

The Second War Powers Act, March 27, 1942, c. 199, sec. 1001, 56 Stat. 176, 182-183, amended the Nationality Act of 1940 by adding a new Title III including the following sections here pertinent:

> Sec. 701. Notwithstanding the provisions of sections 303 and 326 of this Act, any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and who, having been lawfully admitted to the United States, including its territories and possessions, shall have been at the time of his enlistment or induction a resident thereof, may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet an educational test; and (4) no fee shall be charged or collected for making, filing, or docketing the petition for naturalization, or for the final hearing thereon, or for the certification of naturalization, if issued * * * [8 U. S. C. Supp. IV sec. 1001].
>
> Sec. 704. The provisions of this title shall not apply to * * * (2) any conscientious objector who performed no military duty whatever or refused to wear the uniform * * * [8 U. S. C. Supp. IV sec. 1004].

The Act of December 7, 1942, c. 690, 56 Stat. 1041 amended the Nationality Act of 1940 by adding a new section 323a:

> A person who was a member of the military or naval forces of the United States at any time after April 5, 1917, and before November 12, 1918, or at any time after April 20, 1898, and before July 5, 1902, or who served on the Mexican Border as a member of the regular Army or National Guard from June 1916, to April 1917, who is not an alien ineligible to citizenship, who

was not at any time during such period or thereafter separated from such forces under other than honorable conditions, *who was not a conscientious objector who performed no military duty whatever or refused to wear the uniform,* and who was not at any time during such period or thereafter discharged from the military or naval forces on account of his alienage, shall, if he has resided in the United States continuously for at least two years pursuant to a legal admission for permanent residence in lieu of the usual five years' residence within the United States and six months' residence within the State of his residence at the time of filing the petition for naturalization, during all of which two-year period he has behaved as a person of good moral character, be entitled at any time within one year after the date of approval of this Act to naturalization upon compliance with all of the requirements of the naturalization laws, except that—

(1) no declaration of intention shall be required;

(2) no certificate of arrival shall be required unless such person's admission to the United States was subsequent to March 3, 1924; and

(3) no residence within the jurisdiction of the court shall be required.

Such petitioner shall verify his petition for naturalization by the affidavits of at least two credible witnesses who are citizens of the United States, or shall furnish the depositions of two such witnesses made in accordance with the requirements of subsection (e) of section 327 of the Nationality Act of 1940, to prove the required residence, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States. On applications filed for any benefits under this Act, the requirement of fees for naturalization documents is hereby waived. (Emphasis supplied:) [8 U. S. C. Supp. IV sec. 723a]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 572

JAMES LOUIS GIROUARD,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

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SUPREME COURT OF THE UNITED STATES

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JAMES LOUIS GIROUARD,

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The District Court filed no opinion. The opinion of the Circuit Court of Appeals (R. 21) and the dissenting opinion of Judge Woodbury (R. 27) are reported in 149 F. 2nd 760.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered June 1, 1945 (R. 35). By order of Mr. Justice Black August 27, 1945, the time within which to file petition for certiorari was extended to October 30, 1945 (R. 35). Peti-

tion for writ of certiorari was filed October 30, 1945, and was granted December 10, 1945 (R. 36). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

Whether, in view of amendments to the Nationality Act of 1940 recognizing the right of those who have served in the armed forces to naturalization despite their continuing religious scruples against bearing arms, the requirements of attachment to the principles of the Constitution and the statutory oath may be properly held to debar from naturalization an alien who acknowledges the plenary authority of Congress to declare war, who reserves to himself no right to determine the rightness of war once Congress has spoken, and who acknowledges a duty, and is willing, to serve in the armed forces of the United States in places of risk and the greatest danger, but who is, by reason of religious scruples against the taking of human life, unwilling to bear arms.

Statutes Involved

The sections of the Nationality Act of 1940, October 14, 1940, c. 876, 54 Stat. 1137 and amendments thereto herein involved are printed in the Appendix, p. 35. The pertinent portions thereof provide:

> Section. 307 (a) No person, except as hereinafter provided in this chapter, shall be naturalized unless such petitioner * * * (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States * * * [8 U. S. C. sec. 707].
>
> Sec. 335 (a) A person who has petitioned for naturalization shall, before being admitted to citizenship, take an oath in open court * * * (3) to support and defend the Constitution and the laws of the United States

against all enemies, foreign and domestic, and (4) to bear true faith and allegiance to the same. * * *

(b) The oath prescribed by sub-section (a) of this section which the petitioner for naturalization is required to take shall be in the following form: "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constition and laws of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion. [8 U. S. C. sec. 735].[1]

Statement

The petitioner, a native of Canada, entered this country in 1923 and has resided here ever since (R. 4-5). On August

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[1] The pertinent provisions of the Naturalization Act of 1906, Section 4, subdivision Third and Fourth, considered in *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605; *United States* v. *Bland*, 283 U. S. 636 merely prescribed (34 Stat. 596, 497-598):

(Third) The applicant shall declare on oath—

"that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same."

(Fourth) It shall be made to appear that for at least five years preceding the application—

"he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same."

Sec. 504 of the Nationality Act of 1940, Act of October 14, 1940, c. 876, 54 Stat. 1137, 1172, "to revise and codify the nationality laws of the United States into a comprehensive nationality code" repealed the pertinent portions of Section 4 of the Naturalization Act of 1906; but the Nationality Act of 1940 in prescribing the content of the oath of allegiance, sec. 335(a), in substance reenacted Section 4 (Third) of the Naturalization Act of 1906, 34 Stat. 596, 597-598, and in specifying for the first time the precise wording of the oath Section 335(b) adopted the language theretofore prescribed by administrative regulation of the Bureau of Naturalization. The requirement as to showing that the applicant is "of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States" (Sec. 307(a)) was taken almost verbatim from Section 4 (Fourth) of the Naturalization Act of 1906, 34 Stat. 596. The statutory language under consideration in the *Schwimmer*, *Macintosh* and *Bland* cases is in substance identical with that involved in the instant case.

8, 1940, he filed a declaration of intention to become a citizen of the United States (R. 1) and on November 3, 1943, he filed in the United States District Court for the District of Massachusetts his petition for naturalization (R. 7).

Petitioner stated in the Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization filed by him January 26, 1943 (R. 3), that he understood the principles of the government of the United States, believed in its form of government and was willing to take the oath of allegiance in the following form (R. 5-6):

> "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have hertofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God."

Question 26 in the Preliminary Form and the petitioner's answer thereto were (R. 6):

> "If necessary, are you willing to take up arms in defense of the country? No (Non-combatant) Seventh Day Adventist."

In sworn testimony before the acting naturalization examiner on March 9, 1943, the petitioner explained the above answer to questions 26 by saying (R. 15):

> * * * it is purely a religious matter with me, I have no political or personal reasons other than that.

At a hearing held before the district court on August 1, 1944 and on interrogation by the district court judge, the petitioner testified that he was a member of the Seventh Day Adventist Denomination of whom approximately 10,000 were then serving in the armed forces of the United States

as non-combatants, especially in the Medical Corps; and that he was willing to serve in the army but would not bear arms (R. 14, 19).[2]

Disregarding the recommendation of the naturalization examiner that the petition be denied, the district court ruled (R. 19):

> That since the Selective Service and Training Act permits, as a matter of right, an applicant for the draft to express a willingness to serve in the armed forces of the United States, but as a non-combatant, then this petitioner by exercising that right is still a person who can take an unqualified oath of allegiance to the United States, and is therefore eligible to citizenship.

On August 1, 1944, the court accordingly entered its order directing that the petitioner be admitted to citizenship (R. 11-12).

At the same term, on August 25, 1944, a representative of the United States Immigration and Naturalization Service filed a notice of exception (R. 14). From the order of

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[2] In an inquiry form transmitted November 3, 1943 by the Naturalization Service and returned by the clerk of the petitioner's draft board there appears the statement (R. 17): "* * * that in Series X, page 6, the registrant did claim exemption from combatant or noncombatant military service as a conscientious objector; that if he did so claim, he has filed with this Board a 'Special Form for Conscientious Objectors (Form 47) * * *'." The equivocal form of this questionnaire makes it pertinent to note that Series X of the Selective Service Questionnaire merely reads as follows:

> "SERIES X—CONSCIENTIOUS OBJECTION TO WAR
>
> *Instructions:* Any registrant who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form shall sign the statement below requesting a Special Form for Conscientious Objector (Form 47) from the local board which must be completed and returned to the local board for consideration.
>
> By reason of religious training and belief I am conscientiously opposed to war in any form and for this reason request that the local board furnish me a Special Form for Conscientious Objector (Form 47) which I am to complete and return to the local board.
>
> (Signature)"

Form 47 as completed by petitioner was not in evidence.

Court admitting petitioner to citizenship, entered on August 1, 1944, the United States appealed (R. 18).

The opinion of the circuit court of appeals held the case controlled by *United States* v. *Schwimmer*, 279 U. S. 644 (1929); *United States* v. *Macintosh*, 283 U. S. 605 (1931); *United States* v. *Bland*, 283 U. S. 636 (1931), and that under those decisions the statutory oath of allegiance can not be taken by a person who, while willing unqualifiedly to do all else in defense of the country including service in the military forces, is unwilling actually to bear arms in its defense (R. 21-27). The dissenting opinion of Judge Woodbury (R. 27-34) asserted that by the amendment of March 27, 1942, 56 Stat. 182, 183, Congress, although it did not change the section of the Nationality Act prescribing the oath, nevertheless evidenced a change in the interpretation placed upon the oath by this court (*In re Kinloch*, 53 F. Supp. 521 (W. D. Wash. 1944)) and the majority recognized that to give the amendment any meaning it must be interpreted as permitting conscientious objectors who are veterans to take the oath despite their religious scruples against bearing arms (R. 26-27). The dissenting opinion also pointed out that Congress should not be deemed to have intended to have the words of the same oath mean one thing to a conscientious objector who has served in the military forces and something else to one who is willing so to serve (R. 29). And the dissent concluded that the district court judgment should be affirmed on another ground as well: That the *Schwimmer*, *Macintosh* and *Bland* cases are no longer the law.

Accordingly the Circuit Court of Appeals by a 2-1 vote reversed the judgment of the district court (R. 35).

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that the oath of allegiance prescribed in the Nationality Act of 1940 as amended impliedly requires willingness to bear arms as a condition to naturalization.

2. In failing to hold that the 1942 amendments to the Nationality Act of 1940 negative any implied requirement of willingness to bear arms as a condition to naturalization.

3. In holding that the statutory requirements for naturalization were not satisfied because of petitioner's statement of his unwillingness to bear arms.

Summary of Argument

Expression of willingness to bear arms is not a condition upon the right to naturalization.

Although the power of Congress to compel military service is unquestioned as a principle of the Constitution, there is no express statutory provision in the Nationality Act of 1940 requiring statement by the applicant of willingness to bear arms. The oath required of civil officers is substantially the same in form but it has never been, and reasonably could not be, construed to include a promise to bear arms, particularly in view of the inhibition against religious tests as a qualification for office (Art. VI, cl. 3). The policy of granting exemption from combatant service to those having religious scruples against the actual bearing of arms has been recognized since colonial days and by the Congress up to the present time. In the light of this uniform policy of Congress evidencing the theory and practice of the Government in balancing the war power and the right of freedom of conscience, the oath of allegiance cannot by mere implication be read as requiring expression of willingness to bear arms despite religious scruples of the applicant.

The statutory requirement that the applicant be "attached to the principles of the Constitution" by its very generality indicates that Congress intended no rigid rule of precise definition. *Schneiderman* v. *United States*, 320 U. S. 118, 139. It has generally been construed to mean that the alien must be attached to the principles of free Government and the general political philosophy embodied therein. But the Fifth Amendment and the many amendments since made

refute the idea that attachment to any particular provision is essential to satisfy the naturalization requirements. The validity of any future draft law in derogation of religious liberty must depend upon all the conditions obtaining at the time of its passage since religious liberty may be infringed, if at all, to no greater extent than is necessary to preserve the life of the State. *Hirabayashi* v. *United States*, 320 U. S. 81, 99; *Dunne* v. *United States*, 138 F. 2d 137, 141. Thus far, Congress has found recognition of the religious liberty here asserted to be consonant with the efficacious exercise of the war power. And the theory and practice of the Congress in relation to freed of conscience thus exemplified is the guide for construction of the phrase "attached to the principles of the Constitution." *United States* v. *Macintosh* (dis.), 283 U. S. 605, 635; *Schneiderman* v. *United States*, 320 U. S. 118, 132, 135. The willingness of the applicant to serve in the military arm in any capacity establishes his willingness to assume equality of risk in defense of the country as a concomitant of the privilege of United States citizenship.

By two separate amendments in 1942 of the Nationality Act of 1940, each of which amendment clearly recognized the right of war veterans to naturalization despite continuing religious scruples against bearing arms, the Congress has now made clear that the oath of allegiance and the requirement that the applicant be "attached to the principles of the Constitution" do not impliedly—as they never have expressly—require expression of a willingness to bear arms as a condition to naturalization.

On the facts, the instant case is clearly distinguishable from *United States* v. *Schwimmer*, 279 U. S. 644, and *United States* v. *Macintosh*, 283 U. S. 605, insofar as they may be deemed otherwise controlling. The decision in *United States* v. *Bland*, 283 U. S. 636, should be reconsidered and overruled in the light of the subsequent Congressional enactments.

ARGUMENT

The question in this case is very narrow. It is undisputed that naturalization is a privilege that may be granted or withheld at the sole discretion of the Congress. The petitioner also recognizes that Congress has power to fix such conditions as it may deem appropriate to the grant of the privilege, including exaction of a promise to bear arms. And it is recognized that Congress may, in its discretion, compel service in the army in time of war.

The question presented is much narrower:

Has the Congress by implication prescribed that as a condition to naturalization, the applicant shall expressly promise to bear arms?

I.

Expression of Willingness to Bear Arms Is Not a Condition Upon the Right to Naturalization

The Nationality Act of 1940, Sec. 335(b) above quoted specifically prescribes the form of oath in words different[3] but in substance the same as the form of oath prescribed in the Rules and Regulations of July 1, 1929, Rule 8(c), promulgated by the Commissioner of Naturalization under authority of section 28 of the Act of June 29, 1906, c. 3592, 34 Stat. 606 as amended by the Act of March 2, 1929, c. 536, sec. 8, 45 Stat. 1515 and under consideration in *United States* v. *Schwimmer*, 279 U. S. 644, *United States* v. *Macintosh*, 283 U. S. 605 and *United States* v. *Bland*, 283 U. S. 636:

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly to ....., to whom I have

[3] The form of oath prescribed by the Nationality Act of 1940 is the same as that prescribed in the Naturalization Regulations of January 1, 1932, Rule 8, subd. C, par. 1. See Report of the President's Committee to Revise the Nationality Laws, Part 1, p. 48.

heretofore been a subject; that I will support and defend the Constitution and the laws of the United States of America against all enemies, foreign or domestic; and that I will bear true faith and allegiance to the same.

The court below held (R. 23):

> "The Supreme Court has interpreted that oath to mean that the petitioner is willing to bear arms in defense of this country and unless he takes an oath so interpreted the petition is to be dismissed and the privilege of citizenship denied."

citing *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605; *United States* v. *Bland*, 283 U. S. 636. Here the petitioner has clearly indicated his willingness to serve in the military forces of the United States as a non-combatant, although unwilling actually to bear arms. The decision of the court below must therefore be regarded as holding that solely because the petitioner is unwilling actually to bear arms, he is ineligible for naturalization under the Nationality Act on two grounds:

(1) He is unable, without impermissible mental or written reservation, to take the oath prescribed by the Nationality Act of 1940, sec. 335(b): "to support and defend the Constitution and laws of the United States against all enemies, foreign and domestic," and "to bear true faith and allegiance to the same," (8 U.S.C. sec. 735(b)), and

(2) He is not a person "attached to the principles of the Constitution of the United States" within the meaning of sec. 307(a) of the Nationality Act (8 U. S. C. sec. 707(a)).

Petitioner does not question the power of Congress to compel him to render military service. It is the position of the petitioner that a person willing to accept the determination of Congress as to the necessity and justification of war, and to do any and everything to further the prosecution of the war, in or out of the armed services, except actually taking a human life, can properly take the oath, "to

support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic" and "to bear true faith and allegiance to the same" as required by sec. 335 of the Nationality Act, and does not, by reason of his unwillingness actually to bear arms fail to show that he is attached "to the principles of the Constitution of the United States" within the meaning of sec. 307 of the Nationality Act.

A. The Oath of Allegiance Prescribed in the Nationality Act of 1940, as Amended, Includes no Requirement Barring from Naturalization Those Who by Reason of Religious Scruples Alone Are Unwilling to Bear Arms in the Defense of the Country

Admittedly, the statutory oath does not in terms require an expression of willingness to bear arms in defense of the country. The authorization for demanding such a promise, if any there be, must be found by implication. In *United States* v. *Macintosh*, supra, Mr. Chief Justice Hughes referred to the oath required by the Constitution[4] and prescribed by R. S. sec. 1757 (5 U. S. C. sec. 16) containing the provision:

> "That I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion."

It it unquestioned that this form of oath has never been so construed as to preclude a person with conscientious religious scruples against bearing arms from honestly and legally swearing thereto. In view of the specific reference

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[4] Article VI, cl. 3: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious test shall ever be required as a Qualification to any Office or public Trust under the United States."

to foreign enemies, it may not reasonably be argued that this involves support and defense of the Constitution only insofar as it may be involved in the performance of the duties of the particular office.

Salmon P. Chase as Secretary of the Treasury and Edwin M. Stanton as Secretary of war both took this oath without suggestion being made that the oath prescribed by the Constitution could not be taken by a Quaker possessing conscientious scruples against the bearing of arms.

Clearly Congress did not intend by these words to require that all civil as well as military officers of the United States should, as a condition of taking office, promise to join the combatant forces in war time. Such a requirement would be manifestly irrelevant to the office. So here the naturalization oath "to support and defend the Constitution" does not necessarily imply a promise to participate with the combatant forces in war time.

If the promise to bear arms were to be held embraced in the civil oath, such a provision, contrary to the tenets of religious groups constituting an appreciable fraction of the citizens of this country, by so disqualifying them from holding office would, as Chief Justice Hughes said (283 U. S. 605, 63):

> "be generally regarded as contrary not only to the specific intent of the Congress, but as repugnant to the fundamental principle of representative Government."

In the light of the inhibitions against religious tests as a qualification of office (Art. VI, cl. 3), it is manifestly unreasonable to say that the language of the civil oath is to be interpreted as requiring a waiver of religious scruples: it is equally unreasonable to say that the same language in the naturalization oath is to be interpreted as making waiver of religious scruples of the essence. As Mr. Chief Justice Hughes concluded (p. 632):

> "But the naturalization oath is in substantially the same terms as the oath of office to which I have re-

> ferred. I find no ground for saying that these words are to be interpreted differently in the two cases. On the contrary, when the Congress reproduced the historic words of the oath of office in the naturalization oath, I should suppose that, according to familiar rules of interpretation, they should be deemed to carry the same significance."

The oath is "to support and defend the Constitution and laws of the United States." Military force is involved in "defending" the territory of a country against invasion, but a country's Constitution and laws are not necessarily in issue in its wars nor is it necessary that the country be at war for the Constitution and laws to need the support and defense of good citizens. In many ways good citizens support, defend, protect, cherish, shield, and vindicate the principles of the Constitution. These all express loyalty and intelligence; they have no military connotation.[5]

The long-established practice of accepting an equivalent for military service from those whose religious convictions forbid them to bear arms confirms the view that Congress, by prescribing the oath, did not intend to require a promise

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[4] It is not to be overlooked that the oath administered on induction into the United States Army states (10 U. S. C. 1581):

"I, , do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to the Rules and Articles of War." (A. R. 615-500, ¶ 13 (September 1, 1942; AR. 615-500, ¶ 15F. (10 Aug. 1944) *In re Nielsen*, 60 F. Supp. 240-242, n. 2.

Many thousands who, because of religious scruples have been given non-combatant status, have nevertheless taken this oath without the suggestion ever having been made that because of their scruples against bearing arms they were not validly swearing "true faith and allegiance" to the United States.

[5] The first Naturalization Act of March 26, 1790, 1 Stat. 103, required merely proof of good character and the taking of the "oath or affirmation prescribed by law, to support the Constitution of the United States." The next, the Act of January 29, 1795, c. 20, 1 Stat. 414, required a showing that the applicant had behaved for five years as a man of good moral character "attached to the principles of the Constitution of the United States" and an oath, that, inter alia, "he will support the Constitution of the United States." All later acts required the same showing. See 3 Moore, International Law Digest, Section 381.

to give such service. It cannot reasonably be contended that the applicant alien is required in advance to guarantee his willingness to obey all laws that Congress may pass. Obviously, this could not be so with respect to statutes which encroach on the rights guaranteed by the first ten amendments.

The policy of granting exemption to those having religious scruples against the bearing of arms has been followed from Colonial times and is abundantly shown by the provisions of Colonial and State statutes,[7] of State constitutions,[8] and of Acts of Congress.

When the Federal Constitution was submitted to the several states for ratification, Rhode Island, North Carolina, Virginia and Pennsylvania proposed a further amendment which would specifically guarantee freedom of religion to those having religious scruples against bearing arms:

> "That any person religiously scrupulous of bearing arms is to be exempted upon payment of equivalent to

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[7] *Massachusetts:* Resolve June 16, 1781, c. 38, Laws and Resolves 1780-1781, p. 621; Acts January and November, 1776, Acts and Resolves (Province) v. 5, pp. 445, 595; Act 1758, Acts and Reserves, v. 4, p. 159. *New Hampshire:* Act June 1786, Laws (Metcalf ed.) v. 5, p. 177; Act March 1780, Laws, v. 4, p. 274. *New York:* Act February 1755, c. 972, Colonial Laws, v. 3, pp. 1068-1069. *North Carolina:* Act April 1778, 1st sess., c. 1 State Records, v. 24, p. 156; Act April, 1778, 3d sess., c. 1 State Records, v. 24, p. 193. *Virginia:* Act May, 1784, C. XXII, 11 Henn. 389; Act May, 1781, c. 8, 10 Hen. 417; Act October, 1780, c. 3, 10 Hen 334; Act May, 1780, c. XXXV, 10 Hen. 314; Act October, 1777, c. 1, 9 Hen. 345; Act May 1776, c. XII, 9 Hen 139; Act July, 1775, c. 1, 9 Hen. 34. During the colonial period and the period between the Revolutionary War and the adoption of the Constitution, the legislation of all the colonies and the thirteen original States allowed a citizen to obtain a substitute in place of his rendering personal service in the militia. At the present time, practically all of the States allow an exemption from service in the militia either on the absolute ground of conscientious scruples or on the same grounds permitted by the Federal Government.

[8] *Alabama*: 1867, Art. X, §1. *Arkansas*: 1868, Art. XI, §1. *Colorado*: 1876, Art. XVII, §5. *Idaho*: 1889, Art. XIV, §1. *Illinois*: 1870, Art. XII, §6. *Indiana*: 1851, Art. 12, §6. *Iowa*: 1857, Art. 6, §2. *Kansas*: 1859, Art. 8, §1. *Kentucky*: 1890, §220. *Louisiana*: 1898, Art. 300; *Maine*: 1819, Art. XI, §5. *Maryland*: 1864, Art. IX, §1. *Michigan*: 1908, Art. XV, §1. *Mississippi*: 1817, Art. IV, §3. *Missouri*: 1875, Art. 13, §1. *New Hampshire*: 1902, Part I, Art. 13th. *New York*: 1846, Art. XI, §1. *North Carolina*: 1868, Art. XII, §1. *North Dakota*: 1889, Art. XIII, §188. *Pennsylvania*: 1874, Art. 11, §1. *South Carolina*: 1895, Art. XIII, §1. *Tennessee*: 1870, Art. VIII, §3. *Vermont*: 1793, Chap. I, Art. 9. *Washington*: 1889, Art. X, §6. *Wyoming*: 1890, Art. XVII, §1.

pay another in his stead." (Elliot's Debates, Vol. I, pp. 334-335; Vol. II, pp. 531; Vol. III, pp. 657-659; Vol. IV, pp. 243-244.)

At the Pennsylvania Convention the Advocates of Religious freedom pointed out that "powers of Congress are too large. * * * In calling forth the militia on necessary occasions; because * * * they may coerce men to act in the militia whose conscience is against bearing arms in any case." (Elliott's Debates, Vol. II, p. 531.)

James Madison on June 8, 1789, presented to the House a list of amendments:

> "Fourthly. That in Article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit:
>
> 'The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed. * * *
>
> 'The right of the people to keep and bear arms shall not be infringed; a well-armed and well-regulated militia being the best security of a free country: *but no person religiously scrupulous of bearing arms shall be compelled* to render military service in person.'" (Emphasis supplied.) Annals of Congress (Gales) 1st Congress, Vol. I, p. 434; see also Annals, Thirteenth Cong. Third sess. Vol. 28, pp. 774-775.))

The several forms of amendments proposed to protect religious liberty were ultimately merged, of course, in the First Amendment.

The statutes of the United States have, from the beginning, recognized the same policy of respecting the beliefs of those who entertain religious scruples against the Bearing of arms. The first Militia Act of May 8, 1792, sec. 2, c. 33, 1 Stat. 271, 272 provided:

> "All persons who now are or may hereafter be exempted by the laws of the respective states, shall be,

and are hereby exempted from militia duty, notwithstanding their being above the age of eighteen, and under the age of forty-five years."

Section 17 of the Draft Act of February 24, 1864, c. 13, 13 Stat. 6, 9, provided:

"That members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms, and who are prohibited from doing so by the rules and articles of faith and practice of said religious denominations, shall, when drafted into the military service, be considered non-combatants, and shall be assigned by the Secretary of War to duty in the hospitals, or to the care of freedmen, or shall pay the sum of three hundred dollars to such person as the Secretary of War shall designate to receive it, to be applied to the benefit of the sick and wounded soldiers: Provided, That no person shall be entitled to the benefit of the provisions of this section unless his declaration of conscientious scruples against bearing arms shall be supported by satisfactory evidence that his deportment has been uniformly consistent with such declaration."

The Act of January 21, 1903, c. 196, sec. 2, 32 Stat. 775, provided:

"That nothing in this Act shall be construed to require or compel any member of any well-recognized organization at present organized and existing whose creed forbids its members to participate in war in any form and whose religious convictions are against war or participation therein, in accordance with the creed of said religious organization, to serve in the militia or any other armed or volunteer force under the jurisdiction and authority of the United States."

The Act of June 3, 1916, c. 134, sec. 59, 39 Stat. 166, 197, provided:

"All persons who because of religious belief shall claim exemption from military service, if the conscien-

tious holding of such belief by such person shall be established under such regulations as the President shall prescribe, shall be exempted from militia service in a combatant capacity; but no person so exempted shall be exempted from militia service in any capacity that the President shall declare to be non-combatant."

The Act of May 18, 1917, c. 15, sec. 4, 40 Stat. 76, 78, provided:

"* * * Nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be non-combatant:"

The Selective Training and Service Act of 1940, September 16, 1940, c. 720, sec. 5(g), 54 Stat. 885, 889, provided:

"Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to non-combatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction."

It is thus plain that the Congress, in exercising the war powers under the Constitution has also recognized that its exercise of this power must not limit the constitutionally protected individual liberties of the citizen to any greater extent than is reasonably necessary and proper to accomplish the important allowable ends of preserving the life of the Government and the States. *Dunne* v. *United States*, 138 F. 2d 137, 141 (C.C.A. 8, 1943) cert. denied 320 U. S. 790.

Read in the light of the uniform regard by Congress for freedom of religious conscience, the oath of allegiance cannot by mere implication reasonably be read as requiring an expression of willingness actually to bear arms.

Petitioner recognizes the propriety of questions addressed to determining his fitness for citizenship. And the question (R. 6): "If necessary, are you willing to take up arms in defense of this country?" may possibly be appropriate in some cases to evoke answers indicative of such fitness. But when it appears that such question is answered in the negative solely on religious grounds, and when it further appears that aside from actual combatant service involving the shedding of blood, the applicant is ready and willing to render full military service, then it seems clear that the negative answer cannot be made the basis for assertion that the applicant cannot in good faith take the oath.

B. The Statutory Requirement That the Applicant Establish That He is "Attached to the Principles of the Constitution" Does Not Justify Exaction of a Promise to Bear Arms

The phrase "principles of the Constitution" is obviously rather loose. Since it appears in an enactment of Congress, it is important to determine not merely what those principles are but particularly what principles were contemplated by Congress as within the meaning of the language used. More particularly, it is essential to determine whether the Congress in using this language intended to include as

a "principle" the doctrine that, despite the provisions of the First Amendment, those religiously scrupulous of the actual taking of human life but willing to serve in the military arm in a non-combatant capacity are, nevertheless, under the war power and without regard to actual exigency subject to being required actually to bear arms.

The requirement of proof of attachment to the principles of the Constitution of the United States was originally introduced into our laws by the Act of January 29, 1795, 1 Stat. 414. It was intended to insure that the alien was "attached to a republican form of Government", and "a free representative Government deriving its authority from the people and calculated for their benefit" (Annals of Congress (Gales ed.) Third Cong., Vol. 4, pp. 4021, 4022). The phrase has been held to mean "attachment to the principles of free Government which are embedded in that instrument" and to imply "a depth of conviction which would lead to active support of the principles in question, to doing one's share to maintain them". *In re Shanin*, 278 Fed. 739, 741; *In re Levy*, 278 Fed. 621, 623; *In re Stone*, 284 Fed. 868, 871; *In re Bevilacqua*, 295 Fed. 862; *In re Saralieff*, 59 F. 2d 436 (E. D. Mo. 1932); *In re Van Lacken*, 22 F. Supp. 145, 147 (N.D. Calif. 1938). And the Government has taken the position that the alien must believe in and sincerely adhere to the "general political philosophy" of the Constitution. Gov't Br. in *Schneiderman* v. *United States*, No. 2., O.T. 1942. But the Fifth Amendment and the many changes since made in the Constitution refute the idea that attachment to any particular provision is essential to satisfy the naturalization requirements. *Schneiderman* v. *United States*, 320 U.S. 118, 137-38; *United States* v. *Rorin*, 12 F. 2d 942, 944-945.

By the very generality of the term employed it is evident that Congress intended an elastic test, one which should not be circumscribed by attempts at precise definition. *Schneiderman* v. *United States*, 320 U.S. 118, 139. The

difficulty or impossibility of precise definition of the boundaries of the war power insofar as it affects the Bill of Rights is well recognized. The validity of any particular measure drafting men to actually bear arms will depend on all the conditions which obtain at the time the measure is imposed and which support the law imposing it. Cf. *Hirabayashi* v. *United States*, 320 U.S. 81, 99, 101-102. The liberties insured by the First Amendment have a preferred position in the basic scheme (*Schneider* v. *Irvington*, 308 U.S. 147, 161; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Prince* v. *Massachusetts*, 321 U.S. 158, 164) and the freedom of worship guaranteed by the First Amendment is susceptible of restriction only to prevent grave and immediate danger to interests which the Government may lawfully protect. *Board of Education* v. *Barnette*, 319 U.S. 624, 639. To make accommodation between this freedom and the Government's granted powers is therefore always delicate. *Prince* v. *Massachusetts*, 321 U.S. 158, 165. "Congressional enactments having the purposes of raising or maintaining armed forces have high standing because of their importance. At the same time, they must not limit the constitutionally protected individual liberties of the citizen to any greater extent than is reasonably necessary and proper to accomplish the important allowable ends of preserving the life of the Government and the State and their orderly conduct." *Dunne* v. *United States*, 138 F. 2d 137, 141 (C.C.A. 8, 1943), cert. den. 320 U.S. 790. Here involved is a constitution "intended to endure for ages to come, and, consequently to be adapted to the various *crises* of human affairs." *McCulloch* v. *Maryland*, 4 Wheat. 316, 407, 415; *Hirabayashi* v. *United States*, 320 U.S. 81, 100-101. Because of these basic premises, this Court will not presume in construing the naturalization law that Congress meant to circumscribe liberty of religion by general phrases in that statute. Such general phrases "should be construed, not in opposition to, but in accord with, the theory and practice of our Government in relation to freedom of conscience".

United States v. *Macintosh* (dis.), 283 U.S. 605, 635; *Schneiderman* v. *United States*, 320 U.S. 118, 132, 135. And here the theory and practice of the Congress from the beginning has been, as shown above, to exempt from combatant duties those having religious scruples against bearing arms.

History shows, and within the memory of all, in World Wars I and II it has been established that there are other, and important, methods of aiding defense apart from the duties of actual combatant service involving directly the taking of life. The experiences of modern warfare particularly establish that service as a combatant soldier does not necessarily involve greater risks and is no more indispensable in the war effort than is service in numerous other capacities, both in and out of the military service. Modern "total" warfare has merely accentuated this basic fact.

Subject to this exception as to combatant service established by theory and practice the petitioner, as do all other members of the Seventh Day Adventist denomination, adheres to and recognizes the full authority of Congress to subject him to military jurisdiction, and his correlative duties as a non-combatant to serve in the military arm (*Billings* v. *Truesdell*, 321 U.S. 542, 556) and to "take his place in the ranks of the army of his country and risk the chance of being shot down in its defense"; *Jacobson* v. *Massachusetts*, 197 U.S. 11, 29; *United States* v. *Macintosh*, 283 U.S. 605, 624; *In re Kinloch*, 53 F. Supp. 521, 522-523.

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*The non-combatant position of the Seventh Day Adventist Denomination has often been grossly misunderstood. This position is not antimilitarism, it is not pacifism, it is not conscientious objection to war as an instrument of governmental policy as that is ordinarily understood. Seventh Day Adventists do not condemn those who take part in war. On the contrary, as non-combatants they recognize, and have been outstanding in performance of, their duty to aid their government in every way in time of warfare, except by taking human life. They have donned the uniform of the soldier and except for actual bearing of arms have performed all the duties of soldiers. Even under fire, they have helped fortify positions; so also have they been foremost, often under fire, in rendering medical aid to the wounded and sick; and have been constant in all measure to protect human life. They have buried the dead, trans-

By his qualification of the oath the applicant has demonstrated no opposition to the form of the Government or to the principles of free government or the general political philosophy embodied in the Constitution and he has complied with all requirements expressly imposed by the Nationality Act. That Congress who prescribes the terms and conditions of naturalization has made no express requirement of expression of willingness to bear arms is apparent from an examination of the various sections of the Nationality Act. In view of the enactment of the various statutes exempting those having religious convictions against bearing arms from compulsory combatant service, the omission of such an express requirement from the Nationality Act is highly significant." It seems plain that the required showing that the applicant is "attached to the principles of the United States", was not intended by the Congress to include exaction of a promise to bear arms in derogation of the religious belief of the applicant.

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ported men and supplies; and in aid of the war effort, have labored in the factories, the munitions plants, the mines, and the fields wherever the defense of the nation could best be served. The non-combatant is not a coward; he simply conscientiously and courageously objects to affirmative participation in the taking of human life; he dares, however, to assume any military risk necessary to save life.

A Seventh Day Adventist non-combatant does not agitate against war. He recognizes that war is many times unavoidable in the preservation of the State. He does not arrogate to himself the prerogative of deciding whether the government is right or wrong in entering upon a war. He merely maintains an attitude and a conviction that war, whether right or wrong, whether justified or unjustified, whether of aggression or of defense, does not change his obligation of obedience to God.

See official statement of Seventh Day Adventist non-combatant position in "Information and Instructions for Seventh Day Adventist Non-combatant Selective Service Registrants" prepared by Carlyle B. Haynes, General Secretary, of the Seventh-day Adventist War Service Commission, General Conference of Seventh Day Adventists, July; 1944, Appendix, Infra, p. —.

" The refusal to take an oath in advance to bear arms of course creates no rights in the applicant, contractual or otherwise, exempting him from combatant military service, if Congress should so require, and by refusing to take such an oath he does not seek a preferred status. He recognizes the principle of submission to majority rule insofar as it does not trench upon the amendments protecting minorities and he recognizes the fact that the government has the power to regulate and restrain the conduct of the individual citizens under threat of imprisonment or other penalty.

C. Amendatory Legislation in 1942 Makes Plain the Intention of Congress That Statement of Willingness to Bear Arms is Not Required as a Condition of Naturalization Under the Nationality Act of 1940

The Congress by amendment in 1942 of the Nationality Act of 1940 has confirmed that the statute requiring the oath and the showing of attachment to the principles of the Constitution does not by implication bar an alien applicant willing to serve in the military forces but retaining religious scruples against taking human life or bearing arms. By those amendments Congress twice in 1942 expressly recognized the eligibility for citizenship under the general law of one thus unwilling to bear arms. The Second War Powers Act, March 27, 1942, c. 199, sec. 1001, 56 Stat. 176, 182-183, amended the Nationality Act of 1940 to add a new Title III. Section 701 in Title III so added, and as further amended by the Act of December 22, 1944, c. 662, sec. 1, 58 Stat. 886, provides:

> "* * * any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war * * * may be naturalized upon compliance with all the requirements of the naturalization laws except that" the declaration of intention, period of residence, venue, command of the English language, handwriting or signature, and fees are not to be required (8 U.S.C. Supp. IV, sec. 1001; see App'x, p. 37).

Significantly, Section 704, part of the new Title III and added at the same time by the same section of the Second

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In declaring allegiance to the Government of the United States he is willingly submitting himself to the same subjection to the powers of the government as the native born citizen is under. He is not attempting to "conclude the Government" or "stay its hand." He only wishes to be placed on a par with the natural born citizen and not come in on an unequal footing.

War Powers Act, provides (8 U.S.C. Supp. IV sec. 1004; see App'x, p. 37):

> "The provisions of this title shall not apply to * * * (2) any conscientious objector who performed no military duty whatever or refused to wear the uniform * * *."

These amendments to the Nationality Act were accompanied by no amendment of Section 307 or of Section 335 of the Nationality Act of 1940, here under scrutiny and requiring attachment to the principles of the Constitution and prescribing the oath, respectively.

The necessary inference is that Congress intends and recognizes that one who did serve in the military or naval forces and did perform military duty, does not, by reason of his scruples against bearing arms, fail to comply with all the requirements of the naturalization law, i.e. that the oath of allegiance (Section 335) may be taken and the statutory showing of attachment to the principles of the Constitution (Section 307) may be satisfied despite refusal of applicants to state a willingness to bear arms. To hold the contrary would be to nullify the amendment. *In re Kinloch*, 53 F. Supp. 521, 523 (W.D. Wash. 1944); *In re Sawyer*, 59 F. Supp. 428 (Del. 1945). In these cases the courts expressly overruled the contention of the United States that the applicants could not take the oath of allegiance because of their continuing religious convictions against bearing arms. As the court pointed out in the *Kinloch* case (p. 523):

> "If conscientious objectors, who are aliens, performing military duty, and wearing the uniform, are not granted the privileges of citizenship under this act, then the act would be meaningless. It would be so made if an applicant, being a conscientious objector, who has attained the status of a soldier, performs military duty, and honorably wears the uniform (as is admitted in the instant case), is denied citizenship. If the oath of allegiance is to be construed as requiring such

applicant to agree, without mental reservation, to bear arms, then the result would be a denial of citizenship, 'even though Congress has conferred such privilege upon him.'"[1]

The interpretation by Congress of the statutory oath as not requiring willingness to bear arms is thus clear. And this same congressional purpose and interpretation was re-emphasized by the similar Act of December 7, 1942, c. 690, 56 Stat. 1041, adding Section 323a to the Nationality Act (8 U.S.C. Supp. IV sec. 723a; App'x pp. . . .). It too dispenses with certain of the ordinary prerequisites for naturalization as to a person who was a member of the military or naval forces during the Spanish-American War, the 1916-1917 Mexican Border troubles, or during World War I—

> "who is not an alien ineligible to citizenship, * * * who was not a conscientious objector who performed no military duty whatever or refused to wear the uniform * * * Such petitioner shall verify his petition for naturalization by the affidavits of at least two credible witnesses who are citizens of the United States, or shall furnish the depositions of two such witnesses * * * to prove the required * * * *attachment to the principles of the Constitution of the United States* * *. (Emphasis supplied.)

The obvious conclusion is that Congress thereby again recognized that despite his refusal to bear arms a conscientious objector satisfying the other conditions of the statute may properly take the oath of allegiance and be deemed to satisfy the requirements as to attachment to the principles of the Constitution.

True, petitioner cannot take advantage of the special provisions of these two amendments since he has never served in the armed forces. But he does not invoke those sections directly.

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[1] The propriety of this interpretation was conceded by the Department of Justice but rejected in *In re Nielsen*, 60 F. Supp. 240, 242 (D. C. 1945).

The important feature of the 1942 legislation is that Congress, without abrogation or modification of the statutory requirements as to oath and attachment to the principles of the Constitution has expressly recognized that such requirements may be fulfilled by an otherwise qualified alien applicant despite his religious conviction against bearing arms.

The majority opinion of the court below holds that a special dispensation as to the oath was by the 1942 amendment extended to the defined class despite the fact that such dispensation was not included among those specifically granted. It held (R. 26):

> "Congress, we think, in passing this amendment, intended to reward the conscientious objectors who had served or were serving in the armed forces by allowing them to take an oath which did not conflict with their religious scruples. It has passed no legislation expressly changing the meaning as interpreted by the Supreme Court, we do not believe that it intended to extend this reward beyond this particular group."

The attempted reconcilement is invalid. As stated by Judge Woodbury in his dissent (R. 29):

> "The interpretation placed upon this amendment by my associates seems to me to accord to Congress an intention to have the words of the oath mean one thing to a person who is willing to serve and has served in the military forces to the extent permitted by his scruples, and something else to one equally willing to serve but who for reasons of age, sex, dependency or physical unfitness has not been called upon or permitted to do so. I think Congress must have intended the words of the oath to mean the same thing to one who has served in the military or naval forces as they do to one who has not."

Furthermore, the holding of the majority below overlooks that its decision also gives two different meanings to the phrase "attached to the principles of the Constitution" as

those words are used in the Nationality Act: According to the court below, in section 323(a) and 701 of the same Act (8 U.S.C. sec. 723a, 1001) it permits of unwillingness of the applicant to bear arms because of religious scruples, but in section 307(a) (8 U.S.C. sec. 707(a)), the phrase requires willingness to bear arms despite religious scruples. Common sense would dictate a contrary rule. Under decisions of this Court a statute, after amendment, is to be understood in the same sense exactly as if it had read from the beginning as it does amended. *Blair* v. *Chicago*, 201 U.S. 400, 475; *United States* v. *La Franca*, 282 U.S. 568, 578 and cases cited. In the absence of express restriction or other cogent reason, it is properly to be assumed that a term is used throughout a statute in the same sense. *United States* v. *Cooper Corp.* 312 U.S. 600, 607; *Pampanga Mills* v. *Trinidad*, 279 U.S. 214, 216-217. On principle, "support and defend the Constitution of the United States" in the same oath of allegiance cannot mean one thing when sworn by one applicant and something else when sworn by another. And the attachment to the principles of the Constitution required by section 307(a) of the Act (8 U.S.C. sec. 707(a)) must mean the same thing in Sections 323(a) and 701 (8 U.S.C. secs. 723a, 1001) for each requires of the specified class "compliance with all the requirements of the naturalization laws" save for the specified exceptions none of which refer to the oath or attachment to the principles of the Constitution. Indeed, a provision in section 323(a) (8 U.S.C. sec. 723a) reaffirms that the applicant must by witnesses "prove the required * * * attachment to the principles of the Constitution." The "required * * * attachment" can refer only to the attachment required by section 307(a), the section here involved.

Congress by the 1942 amendments has made it clear that the sections of the Nationality Act here in question and their practically identical forerunners upon which the decisions in the *Schwimmer* and *Macintosh* cases were posited are not to be regarded as impliedly requiring as a condition

of naturalization declaration by the applicant of willingness to bear arms.

II.

Prior Decisions of This Court to the Extent That They Are Not Clearly Distinguishable Should Be Reconsidered and Overruled.

As the Government in its Memorandum on petition for the writ concedes, the *Schwimmer* and *Macintosh* decisions relied on by the court below (R. 23-25) are distinguishable on their facts. In those cases the statutory oath of allegiance required as a condition to naturalization was held to bar the applicants because statements in the preliminary forms for petition for naturalization and on hearing were deemed to indicate lack of ability, without unpermissible mental or written reservation, to take the required oath "to support and defend the Constitution and laws of the United States against all enemies, foreign and domestic" and as well were deemed inadequate to satisfy that the applicant was "attached to the principles of the Constitution." Those cases, however, were decided on facts quite different from those presented in the instant case and involved applicants whose asserted rights of conscience if recognized would have imposed serious limitation on the war power of Congress and in effect and tendency constituted much greater threats to the untrammeled exercise of that power.

Here it merely appears that petitioner, because of his religious scruples against the taking of human life, is unwilling to bear arms in the technical sense of the word. So far as appears, he recognizes that under the war power, once Congress has spoken, its decision in making war is final and must, of necessity, be binding on all. He is willing to serve in the armed forces of the United States and under the military jurisdiction as this court has recently reaffirmed the right of Congress to require. *In re Summers*, 325 U.S.

561, 572-573. Petitioner asserts no right to question the moral rightness of any particular war, nor does he debate the finality and necessarily binding effect on him of the decision of Congress. Neither does he seek to reserve to himself determination of the extent or manner in which he shall assist in the defense of the country; his willingness to support the Government in time of war is unequivocal. His sole limitation is that as a matter of religious belief he cannot take human life and in that sense cannot bear arms. As has been abundantly exemplified in the present war, the attitude of such persons in no way tends to influence others against the use of military force. On the contrary the history of this war has again established that in the medical corps, in the hospital corps, and in other branches of the military forces they have by their fearless conduct and indifference to danger in succor of others inspired and fortified all in the stress of battle.[12]

The facts and reasoning in the cases cited by the court below (R. 23-24) make it plain that they have erroneously been held controlling in the instant case.

In *United States* v. *Schwimmer*, 279 U.S. 644, it appears that the applicant's refusal to express a willingness to bear arms and this Court's holding that she failed to show the required attachment and ability to take the prescribed oath were based on the following reasons:

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[12] Of the nearly twelve thousand members of the Seventh-day Adventist denomination who served as non-combatants in the military and naval forces of the United States during hostilities just ended, we are informed that forty-five received the bronze Star Medal, six of which also received Oak Leaf Clusters with these medals; twelve received the Silver Star Medal, two of which also received Oak Leaf Clusters with these medals; one received the Gold Star Medal; six received special Commendations; one received the Air Medal; Sixteen received Presidential Citations; three received Meritorious Service Plaques; three received Legion of Merit Awards; one received a Certificate of Merit; five received the Soldier's Medal; one received the Cruix de Guerre; and one received the Congressional Medal of Honor.

Ninety-two men have received a total of one hundred nine awards. Although the check has not yet been completed, a large proportion of these awards has been vertified by the War and Navy Departments.

(1) She was an avowed pacifist. This Court held (p. 652):

> "But the word is also used and understood to mean one who refuses or is unwilling for any reason to bear arms because of conscientious considerations and *who is disposed to encourage others in such refusal.*" (Emphasis supplied)

(2) She had "no sense of nationalism, only a cosmic consciousness of belonging to the human family" (p. 648). This court held (pp. 651-652) that this and her pacifism

> "—justifies belief that she may be opposed to the use of military force as contemplated by our Constitution and laws."

(3) She stated: "With reference to spreading propaganda among women throughout the country about my being an uncompromising pacifist and not willing to fight, I am always ready to tell anyone who wants to hear it that I am an uncompromising pacifist and will not fight. In my writings and in my lectures I take up the question of war and pacifism if I am asked for that" (p. 648-649). This court held (pp. 651-652):

> "The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms. * * * And her testimony clearly suggests that she is disposed to exert her power to influence others to such opposition.

(4) No question of religious belief was involved. The Solicitor General in his brief in that case said (p. 17): "Refusal to perform military service on account of religious scruples is not involved in this case."

In contrast, the applicant here, like his co-religionists, has emphasized a willingness to serve in the military forces so long as he is not compelled as a combatant to take human life and there is no showing of purpose or disposition on

his part to influence others. His scruples are solely religious. The *Schwimmer* case thus falls far short of requiring denial of the application of the petitioner here involved.

In *United States* v. *Macintosh*, 283 U.S. 605, the applicant had no religious scruples against the taking of human life or against bearing arms in defense of the country and he expressly stated that he was willing to bear arms (p. 617). There the disqualification rested upon the entirely distinct ground, not at all present here, that the applicant sought to reserve to himself the right to determine the moral justice of any war despite the decision of Congress. There the evidence as to the applicant showed, as this Court said (p. 619-620):

> "that he will not assist in the defense of the country by force of arms or give any war his moral support unless he believes it to be morally justified, however necessary the war might seem to the government of the day; that he will hold himself free to judge of the morality and necessity of the war, and, while he does not anticipate engaging in propagandizing against the prosecution of a war declared and considered justified by the government, he prefers to make no promise even as to that; and that he is convinced that the individual citizen should have the right to withhold his military services when his best moral judgment impels him to do so."

This Court held (p. 625) that the applicant—

> "discloses a present and fixed purpose to refuse to give his moral or armed support to any future war in which the country may be actually engaged, if, in his opinion, the war is not morally justified, the opinion of the Nation as expressed by Congress to the contrary notwithstanding."

As pointed out by Dean Wigmore, Macintosh would on principle be unsubmissive to all laws directed to winning the war. "The Macintosh principle is nothing less than the right of individual secession." Wigmore, United States v. Macintosh, A Symposium, 26 Ill. L. Rev. 375, 377, 379. Fur-

thermore, the right of the individual to judge for himself as to the moral justification for a particular war, once recognized, would presumably involve the right to be adequately informed of the relevant facts in order to make an informed judgment. But reference to the recognized criteria for determining whether a war is just (3 Vattel, Law of Nations (Text of 1758, Translation) Book III, c. 3, secs. 28, 37, 38, 41-44, pp. 244, 246-249) makes it apparent that the war might be fought and lost or won long before all relevant circumstances were known to anyone, much less the average citizen. As was pointed out by the Solicitor General in his brief in that case, p. 11: "If [the right of the individual to decide for himself whether a war is morally justified were recognized] the constitutional powers of Congress to declare war and raise and support armies would become impotent."

Obviously, there is nothing in the record that brings the petitioner within the *Macintosh* case. Petitioner has indicated not the slightest hesitation to accept the expressed will of the Government nor a lack of willingness at all times to support and defend the Government and in every way to further, and in no way hinder, by propaganda or otherwise, the successful prosecution of war, whether he be within or without the armed forces of the nation, save that he will not actually bear arms as a combatant since that would necessarily involve obligation to take human life.

Thus the *Schwimmer* and *Macintosh* cases afford no basis for denial of naturalization to petitioner. They do not hold that a mere religious scruple against bearing arms by an applicant otherwise recognizing and willing to discharge his military obligation is to be regarded as presenting an insurmountable barrier. One who, subject to his religious inhibition against taking human life, recognizes the plenary authority of Congress under the war power and reserves no right to hinder or impair any exercise of that power but is ready to risk his life in the military forces and in

other ways to uphold the hands of the authorities surely is not to be classed with those who would subvert the defense of the Government upon their own judgment that a war is morally justified.[13]

In the majority opinion in *United States* v. *Bland*, 283 U.S. 636, it is stated (p. 636): "The only difference between the position she took, and that taken by the respondent in the *Macintosh* case, is that in addition to refusing positively to bear arms in defense of the United States under any circumstances, she required an actual amendment of the oath * * *." Examination of the record in that case does disclose, as the Government contends, that the applicant's reservation related to her religious scruples alone and that these limited her willingness to do everything within her power in defense of the country only to the same extent as do those of the applicant in the instant case. She avowed her continued willingness, already demonstrated, to serve as a nurse or in any other capacity subject to the military jurisdiction, so long as it did not involve the taking of life.[14] Subsequent legislation has on a number of bea-

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[13] It has been suggested that the dissenting opinion in the *Macintosh* case was not addressed to showing that Macintosh was entitled to admission but rather was an argument that the matter should be considered from the point of view of a person who in the future might apply for citizenship and who, as a member of a well-recognized religious sect opposed to war in any form would, because he thus falls within the express language of the Act of May 18, 1917, c. 15, sec. 4, 50 Stat. 76, 78, be able to take the position that he, though an alien, is in the same class as many citizens of the United States who have for a long time been exempt from combatant service. Cf. Wigmore and Sears, United States v. Macintosh, A Symposium, 26 Ill. L. Rev. 375, 380, 383.

The precise boundary of the liberty of religious conscience recognized by the naturalization law need not be decided in this case, since clearly petitioner satisfies the minimum showing recognized by the Congress as entitling to exemption from combatant service in both the Draft Act of 1917, supra p. ..., and the Selective Training and Service Act of 1940 supra p. ...

Neither is there here presented any question that petitioner's objections to bearing arms are prompted by conscience or that his scruples are religious in character. Cf. *Kauten* v. *United States*, 133 F. 2nd 703 (C. C. A. 2, 1943); see Cornell, The Conscientious Objector and the Law (1943) p. 16.

[14] Indeed under the Act of December 7, 1942, c. 690, 76 Stat. 1041, Miss Bland would now appear to be eligible for citizenship despite her religious scruples, and as well free of certain requirements as to residence, etc., see supra, p. ...

sions been recognized as requiring this Court to re-examine and overrule its prior decision. *Helvering* v. *Griffiths*, 318 U.S. 371, 401. For the reasons outlined above, and particularly because of the 1942 amendments to the Nationality Act of 1940, it is submitted that the decision in the *Bland* case should now be re-examined and overruled.

Conclusion

It is submitted that the judgment of the Circuit Court of Appeals for the First Circuit should be reversed.

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APPENDIX

The Nationality Act of 1940, October 14, 1940, c. 876, 54 Stat. 1137, 1142, 1157, provides:

Sec. 307. (a) No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States [8 U. S. C. sec. 707(a)].

Sec. 335. (a) A person who has petitioned for naturalization shall, before being admitted to citizenship, take an oath in open court (1) to support the Constitution of the United States, (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen, (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic, and (4) to bear true faith and allegiance to the same, provided that in the case of naturalization of a child under the provisions of section 715 or 716 the naturalization court may waive the taking of such oath if in the opinion of the court the child is too young to understand its meaning. [8 U. S. C. sec. 735 (a)].

(b) The oath prescribed by subsection (a) of this section which the petitioner for naturalization is required to take, shall be in the following form:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity

to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God. In acknowledgment whereof I have hereunto affixed my signature [8 U. S. C. Sec. 735 (b)].

The Second War Powers Act, March 27, 1942, c. 199, sec. 1001, 56 Stat. 176, 182-183, amended the Nationality Act of 1940 by adding a new Title III including the following sections here pertinent:

Sec. 701. Notwithstanding the provisions of sections 303 and 326 of this Act, any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and who, having been lawfully admitted to the United States, including its territories and possessions, shall have been at the time of his enlistment or induction a resident thereof, may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; and (4) no fee shall be charged or collected for making, filing, or docketing the petition for naturalization, or for the final hearing thereon, or for the certification of naturalization, if issued: *Provided, however,* That (1) there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each such witness personally knows the petitioner to be a person

of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, (2) the service of the petitioner in the military or naval forces of the United States shall be proved by affidavits, forming part of the petition of at least two citizens of the United States, members or former members during the present war of the military or naval forces of the non-commissioned or warrant officer grade or higher (who may be the witnesses described in clause (1) of this proviso), or by a duly authenticated copy of the record of the executive department having custody of the record of petitioner's service, showing that the petitioner is or was during the present war a member serving honorably in such armed forces, and (3) the petition shall be filed not later than one year after the termination of the effective period specified in section 645 of the Appendix to Title 50. The petitioner may be naturalized immediately if prior to the filing of the petition the petitioner and the witnesses required by the foregoing proviso shall have appeared before and been examined by a representative of the Immigration and Naturalization Service [8 U. S. C. Supp. IV, sec. 1001].

Sec. 704. The provisions of this title shall not apply to (1) any person who during the present war is dishonorably discharged from the military or naval forces or is discharged therefrom on account of his alienage, or (2) any conscientious objector who performed no military duty whatever or refused to wear the uniform: *Provided*, That citizenship granted pursuant to this subchapter may be revoked as to any person subsequently dishonorably discharged from the military or naval forces in accordance with Section 738 of this title; and such ground for revocation shall — in addition to any other provided by law [8 U. S. C. Supp IV sec. 1004].

The Act of December 7, 1942, c. 690, 56 Stat. 1041 amended the Nationality Act of 1940 by adding:

> Sec. 323 (a). A person who was a member of the military or naval forces of the United States at any time after April 5, 1917, and before November 12, 1918, or at any time after April 20, 1898, and before July 5, 1902, or who served on the Mexican Border as a member of the regular Army or National Guard from June 1916, to April 1917, who is not an alien ineligible to citizenship, who was not at any time during such period or thereafter separated from such forces under other than honorable conditions, *who was not a conscientious objector who performed no military duty whatever or refused to wear the uniform,* and who was not at any time during such period or thereafter discharged from the military or naval forces on account of his alienage, shall, if he has resided in the United States continuously for at least two years pursuant to a legal admission for permanent residence in lieu of the usual five years' residence within the United States and six months' residence within the State of his residence at the time of filing the petition for naturalization, during all of which two-year period he has behaved as a person of good moral character, be entitled at any time within one year after the date of approval of this Act to naturalization upon compliance with all of the requirements of the naturalization laws, except that—
>
> (1) no declaration of intention shall be required;
>
> (2) no certificate of arrival shall be required unless such person's admission to the United States was subsequent to March 3, 1924; and
>
> (3) no residence within the jurisdiction of the court shall be required.
>
> Such petitioner shall verify his petition for naturalization by the affidavits of at least two credible witnesses who are citizens of the United States, or shall furnish the depositions of two such witnesses made in accordance with the requirements of subsection (e) of

section 327 of the Nationality Act of 1940, to prove the required residence, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States. On applications filed for any benefits under this Act, the requirement of fees for naturalization documents is hereby waived [8 U. S. C. Supp. IV, sec. 723a].

The Seventh-Day Adventist Belief With Respect to Bearing Arms

"Information and Instruction for Seventh-day Adventist Noncombatant Selective Service Registrants" prepared by Carlyle B. Haynes, General Secretary of the Seventh-day Adventist War Service Commission and Member of the Executive Committee of the General Conference of Seventh-day Adventists, includes the following statement as to the religious belief of that denomination with respect to the bearing of arms:

The Noncombatant Position

Seventh-day Adventist men, because of their religious training and belief, are rightly classified under the Selective Training and Service Act as "Conscientious Objectors." There is an element in this fact which is unfortunate, for they do not consider this an accurate description of their real position.

"Conscientious objection to war" may be an accurate description of the position of pacifists, war-resisters, anti-militarists, and others who refuse to serve in the armed forces of the United States. It does not, however, adequately describe the position of noncombatancy held by Seventh-day Adventists.

From the beginning of their organized existence, Seventh-day Adventists have called themselves noncombatants. They still call themselves noncombatants. They still hold the noncombatant position.

This is not anti-militarism, it is not pacifism, it is not conscientious objection to war as that is ordinarily understood. It is rather a discriminating recognition of the divinely stated principle enunciated by Jesus Christ that the Christian lives and moves in a twofold area of obligation and loyalty. He has a duty to his government as well as to his God. He is to render to Caesar those things that belong to him just as faithfully as he renders to God those things which belong to God.

Seventh-day Adventists, therefore, holding this belief of noncombatancy, are not thereby moved to oppose their government in war any more than they oppose it in peace. Rather are they instructed to obey their government in war as in peace, within the full limits in which a Christian can rightly live and act.

They do not assume one attitude toward government in time of peace, and take an opposite attitude in time of war. Rather do they hold that a Christian's attitude and allegiance to both God and government are not altered by either war or peace.

The belief of the Seventh-day Adventist noncombatant does not require him to agitate against war, to oppose militarism, to be insubordinate, to oppose the military program, or to stand apart from the military establishment and organization. It merely requires that a Seventh-day Adventist shall continue to be a Christian in war as well as in peace, recognizing that his allegiance to God, which is his first and highest allegiance, is supreme then as it has been supreme before.

The essential meaning of his belief as a noncombatant, to a Seventh-day Adventist, is merely that he recognizes there are no circumstances in earthly affairs which can arise, no emergencies which can occur, no distress of nations which can come, which can possibly alter in a single degree his obligation, his obedience, his allegiance, his loyalty, his duty, to his Maker and Redeemer.

Noncombatancy's simplest but most comprehensive definition is just "God first—always."

The noncombatant belief grows out of a philosophy of relationship, not primarily with reference to government, but to God. It is not a political philosophy at all.

A Seventh-day Adventist noncombatant does not agitate against war. He recognizes that war is a natural, unavoidable consequence of a race in a state of sin. He does not arrogate to himself the prerogative of deciding whether his government is right or wrong in entering upon a war. He leaves that where it belongs, —to his government.

He recognizes that war is an agency which God Himself has on occasion used to carry out divine objectives. He does not presume to sit in judgment upon civil governments for engaging in war. He merely maintains an attitude and a conviction that war, whether right or wrong, whether justified or unjustified, whether of aggression or of defense, does not change the individual Christian's obligation of obedience to God.

His belief in his denominational teaching of noncombatancy does not move the Seventh-day Adventist to refuse to wear a uniform, to salute his country's flag, to obey military orders. He will participate in any service, in the military service or out of it, in war or in peace, which will contribute to the saving, the maintenance, the well-being, of human life. He holds that his supreme allegiance to God, his discipleship to Jesus Christ, prevents him from engaging in any act, any service, any participation in anything which contributes to destroying or injuring human life, in the military service or out of it, in war or in peace.

Noncombatancy does not concern itself with what the government does or does not do. It concerns itself only with the individual's accountability to God. Always, everywhere, in every condition or circumstance, the individual Seventh-day Adventist noncombatant just puts God's will first.

He will participate in the military establishment. He will enter willingly upon training and service. He will wear his country's uniform. He will salute his

country's flag. He will aid his country in its need. He will be diligent in the performance of his duties. He will be zealous in rendering his last full measure of devotion. He will not shun danger. He will not shirk his work. He will strive to be foremost in efficiency and skill. But he will put God first, and be obedient to His will and carry out His teachings wherever he is, whatever he is doing, in the army or out of it, in war as in peace.

Seventh-day Adventist noncombatants believe that in this world of sin, where war is unavoidable, they can perform the best service to their fellow men and to their country by ministering to human welfare rather than by fighting to take human life. They desire to render the very greatest service within their capacities to their fellow men and to their government, the service of saving life rather than destroying life.

In rendering this, the greatest service within their power, they will not shun danger, or refuse to go into the direct line of fire, or expose themselves to death in the accomplishment of their purposes, those of ministering to human need, of relieving human suffering, or saving human life.

The noncombatant position is not one of cowardice. It is a conviction held without any reference at all to danger or to safety. Those who hold it are entirely willing to sacrifice their own lives to aid their government, to help humanity—if that is required—while keeping within the circle of God's will. Their only refusal is to go outside that circle.

They do not refuse to die. They do not shun danger. They do not avoid the first line of action. They will go anywhere and do anything to help men. Their sole and only refusal is to disobey God. They are afraid of nothing but sin.

The noncombatant position does not lead its adherents to accept all the benefits of civil government in times of peace and refuse to aid civil government when it is in jeopardy. Noncombatants are good citizens in times of peace because they are good Christians. They are equally good citizens in times of war, ready to help

civil government in any and all noncombatant capacities, and because they continue to be good Christians in time of war they insist that their service to government then shall continue to be on the same basis as it was before—within the circle of God's will.

The noncombatant belief leads those who hold it to request their government, when it calls them to its service, to place them in those branches of the army and navy in which they will be able to render the supreme service they desire to give, that of ministering to human welfare, helping to preserve life, healing the sick, restoring the wounded, feeding and clothing their associates, rescuing the abandoned and crippled.

As inconsistent with their noncombatant belief they avoid the bearing of arms in any capacity. Agencies of destruction and weapons of warfare are not compatible with their faith; therefore they seek to help in those activities and services which are compatible.

The Seventh-day Adventist noncombatant recognizes his duty to his government and his obligation to serve it faithfully when called to do so. He believes his government is entirely within its rights when it calls for his services when they are needed, and he is ready and willing to yield it all obedience up to the giving of his life in response to its call.

But he will not disobey God. God's will with him comes first. With that single reservation he is willing to give his all and do his supreme best in the service of his government. He is not a rebellious citizen. He is not a reluctant citizen. He is the most truly loyal citizen of all. But he is, by reason of his relationship to God, ever keeping in mind the fundamental principle of Christian life—"God first—always."

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 572

JAMES LOUIS GIROUARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 26–39) are reported at 149 F. 2d 760.

JURISDICTION

The judgment of the circuit court of appeals was entered June 1, 1945 (R. 40). On August 27, 1945, Mr. Justice Black extended to October 30 petitioner's time to file a petition for a writ of certiorari (R. 40), and the petition was filed on that date. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an alien who has religious scruples against bearing arms but is willing to serve in a noncombatant capacity may be admitted to citizenship.

STATUTE INVOLVED

The pertinent provisions of the Nationality Act of 1940 and the amendments thereto are printed as an appendix to the petition for a writ of certiorari, pp. 20–22.

STATEMENT

Petitioner, a native of Canada, entered the United States in 1923 and has since resided in this country (R. 17). In 1940 he filed a declaration of intention to become a citizen of the United States (R. 2–3), and in 1943, a petition for naturalization (R. 9–13). In answer to the question, on the preliminary form of application, as to whether he was willing to take up arms in defense of the United States, petitioner answered: "No (Non-combatant) Seventh Day Adventist" (R. 7). On preliminary examination before a naturalization examiner, petitioner stated that this answer was based on purely religious grounds (R. 17, 19). In his Selective Service questionnaire he had claimed exemption from both combatant and noncombatant military service as a conscientious objector (R. 17, 21). At a hearing before the district judge, petitioner testified that

he was a member of the Seventh Day Adventist sect, many of whom, he said, were serving in the armed forces as noncombatants, and that he was willing to serve in the Army as such noncombatant, but would not bear arms (R. 18). The district judge ruled (R. 18):

> That since the Selective Service and Training Act permits, as a matter of right, an applicant for the draft to express a willingness to serve in the armed forces of the United States, but as a non-combatant, then this petitioner by exercising that right is still a person who can take an unqualified oath of allegiance to the United States, and is therefore eligible to citizenship.

He accordingly admitted petitioner to citizenship (R. 14). On appeal, the judgment was reversed (R. 40), one judge dissenting (R. 32–39).

ARGUMENT

We think the majority of the court below properly ruled that the decisions of this Court in *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605; and *United States* v. *Bland*, 283 U. S. 636,[1] compelled a holding that petitioner was ineligible to be admitted to citizenship. The *Schwimmer* and *Macintosh* decisions may, as petitioner contends (Pet. 5–9), be distinguished from the present case on their facts, in that Mrs. Schwimmer expressed

[1] See also *In re Summers*, No. 205, October Term, 1944, decided June 11, 1945.

opposition to any form of military force and Macintosh reserved the right to make an individual determination of the moral justification of a particular war. It is, however, impossible so to distinguish the *Bland* decision. There the applicant for citizenship, who had actually spent nine months nursing soldiers in France during World War I, expressed her willingness to defend the country "as far as my conscience as a Christian will allow," and it was evident, as Chief Justice Hughes pointed out in his dissenting opinion, that her reservations related to her religious scruples against bearing arms. (See also the opinion of the Second Circuit holding that Miss Bland could properly take the oath, 42 F. 2d 842.) This Court ruled that she was nevertheless ineligible for citizenship because she would not unqualifiedly agree to bear arms in defense of the United States.

In 1940, approximately ten years after the *Bland* decision, Congress passed the Nationality Act of 1940, which made important changes in the law of naturalization in other respects, but did not change the requirement of the oath of allegiance and did not provide for the admission to citizenship of aliens having conscientious objections to bearing arms. In fact, the 1940 Act specified the form of the oath of allegiance (Sec. 335 (b), App. to Pet., p. 20), which, prior to that time, had been prescribed by administrative regulation. This action on the part of Congress

would seem to be a recognition and an acceptance of the majority opinions of this Court in the cases referred to.

In 1942, amendments to the Nationality Act granted special privileges to aliens who served in the armed forces of the United States in wartime by eliminating or changing the requirements as to declaration of intention, period of residence, fees, etc. (Secs. 323 (a) and 701, App. to Pet., pp. 21–22). Both these statutes specifically provide that the benefits conferred shall not be available to a "conscientious objector who performed no military duty whatever or refused to wear the uniform." Petitioner argues (Pet. 12–17) that the specific exclusion of conscientious objectors who performed no service implies that conscientious objectors who did perform military duty in uniform are eligible to the benefits of the statute, and that, since these amendments made no change in the oath of allegiance, they represent a congressional declaration that persons willing to perform noncombat service in uniform may properly take the oath, despite religious scruples against bearing arms. The implications of the 1942 amendments must be found from the words of the statutes themselves, for there is no discussion of the status of conscientious objectors under these amendments in the committee reports or congressional debates. (See 77th Cong., 2d sess., S. Reps. 989, 1664; H. Reps. 1765, 1896; 88 Cong. Rec. 1589, 1790–1791, 1794. See also H. Rep.

1710.) Two district courts have held that the clause excluding conscientious objectors who performed no military service did have the effect of permitting naturalization of aliens who actually served in a noncombatant capacity even though they would not unqualifiedly agree to bear arms in defense of the country. *In re Kinloch*, 53 F. Supp. 521 (W. D. Wash.); *In re Sawyer*, 59 F. Supp. 428 (D. Del.). The district court for the District of Columbia has recently held to the contrary. *In re Nielsen*, 60 F. Supp. 240. The majority of the court below seems to have accepted the interpretation in the *Kinloch* decision, but considered that the 1942 amendments granted the privilege of naturalization only to conscientious objectors who had actually served in a noncombatant capacity, as a reward for actual service (R. 31–32). Since it is unlikely that Congress intended to make a fundamental change in the general requirements for citizenship without comment and by indirection, we do not think the 1942 amendments can be deemed to have limited the effect of the *Bland* decision.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 572

JAMES LOUIS GIROUARD, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court wrote no opinion when it admitted petitioner to citizenship (R. 11–12). The opinion of the circuit court of appeals (R. 21–27) and the dissent (R. 27–34) are reported at 149 F. 2d 760.

JURISDICTION

The judgment of the circuit court of appeals was entered June 1, 1945 (R. 35). On August 27, 1945, Mr. Justice Black extended to October 30 petitioner's time to file a petition for a writ of certiorari (R. 35). The petition was filed on that date and was granted December 10, 1945

(R. 36). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an alien who is unwilling because of religious scruples to bear arms in defense of this country, but who is willing to serve in a non-combatant capacity, may be admitted to citizenship.

STATUTES INVOLVED

The pertinent provisions of the Nationality Act of 1940 are set forth in Appendix A, *infra*, pp. 63–68. Other provisions of law, which will be referred to in the Argument, are set forth in Appendix B, *infra*, pp. 69–70.

STATEMENT

Petitioner was born in Canada in 1902. He came to the United States in 1923 and has resided in this country since that time (R. 1, 14). In 1940 he filed a declaration of intention to become a citizen of the United States in the United States District Court for the District of Massachusetts, describing himself as an engineer, and stating that he had a wife and daughter living with him (R. 1–2). On January 26, 1943, petitioner filed a petition for naturalization (R. 3–7). In his preliminary form for the petition, he stated that he was willing to take the following oath of allegiance (R. 5–6):

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion.

In answer to the question in the form as to whether he was willing to take up arms in defense of the United States, if necessary, petitioner stated, "No (Non-combatant) Seventh Day Adventist" (R. 6, 14). On preliminary examination before a naturalization examiner on March 9, 1943, petitioner stated that his answer was based solely on religious grounds—"it is a purely religious matter with me, I have no political or personal reasons other than that" (R. 14, 15).

At two places in the record of this case there appears the statement, "In his Selective Service questionnaire he had claimed exemption from both combatant and non-combatant military service as a conscientious objector" (R. 14, 18–19). This reflects, we believe, a misreading of the equivocal report of petitioner's local draft board (R. 17). At any rate, the statement is not true in fact. We have examined petitioner's original

Selective Service questionnaire, and find that he did not claim exemption from all military service, but only from combatant military duty. Throughout this brief, therefore, we disregard the erroneous statements in the record above noted, and deal with petitioner as one who was willing at all times to participate in noncombatant service under the direction of the military authorities.

At a hearing before the district judge on petitioner's application for naturalization on August 1, 1944, petitioner testified that he was a member of the Seventh Day Adventist sect, several thousand of whom, he said, were serving in the armed forces as noncombatants, and that he was willing to serve as a noncombatant, but that he would not bear arms (R. 14). The district court ruled (R. 15):

> That since the Selective Service and Training Act permits, as a matter of right, an applicant for the draft to express a willingness to serve in the armed forces of the United States, but as a non-combatant, then this petitioner by exercising that right is still a person who can take an unqualified oath of allegiance to the United States, and is therefore eligible to citizenship.

It accordingly ordered that petitioner be admitted to citizenship (R. 11–12, 14). On appeal, the order was reversed (R. 21–27, 35), one judge dissenting (R. 27–34).

SUMMARY OF ARGUMENT

I

The basic question at issue, whether an alien willing to perform noncombatant military service but unwilling to bear arms may be admitted to citizenship, turns on the meaning of the Nationality Act of 1940 as amended.

In *United States* v. *Schwimmer*, 279 U. S. 644, *United States* v. *Macintosh*, 283 U. S. 605, and *United States* v. *Bland*, 283 U. S. 636, the Court held, construing earlier statutes, that an alien unwilling without qualification to bear arms in defense of the United States was not entitled to citizenship. While the present case is distinguishable on its facts from those of *Schwimmer* and *Macintosh*, it cannot be distinguished from that of *Bland*. At any rate, the cases have been generally understood by the public, by the profession, and by this Court, as laying down a broad rule of general application. *In re Summers*, 325 U. S. 561, 572.

For over eleven years, from the date of the *Schwimmer* case until the enactment of the comprehensive Nationality Act of 1940, Congress acquiesced in the rule that established the arms-bearing requirement for naturalization. It undertook no affirmative change in the law, in the face of an unbroken current of judicial decision, although on numerous occasions it amended the statutes which prescribed the qualifications for admission to citizenship. And for over eleven

years it refused to overturn the arms-bearing rule by amendment, although during all of that time there were pending before it bills to that end, which were advocated in speeches and on which hearings were had. It is clear, therefore, that Congress approved the rule.

Finally, in the Nationality Act of 1940, Congress reenacted the rule that an alien's willingness to bear arms in defense of the United States was a prerequisite for admission to citizenship. It reenacted without substantial change the statutes considered in the *Schwimmer, Macintosh,* and *Bland* cases, and it gave statutory sanction to the oath which theretofore had been prescribed only administratively. This amounted to a reenactment of the judicial construction which had been placed on those provisions. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 488–489. In these circumstances there is no room for the suggestion that, by not expressly adding the arms-bearing requirement, Congress intended to leave open for judicial reconsideration the point on which this Court had divided in the earlier decisions. The legislative history negatives any such conclusion. Consequently, after 1940, the arms-bearing requirement stood on a new and independent legislative footing.

II

Subject only to the constitutional requirement as to uniformity, the qualifications for naturalization

are for Congress to prescribe; it can condition the offer as it sees fit. The only question for the courts is to ascertain what those requirements are.

There is no basis for petitioner's contention that he is entitled as of right to stand on an equality with citizens who because of religious scruples are likewise unwilling to serve except as noncombatants. The Constitution and laws of the United States have never put aliens and citizens on a parity.

Numerous classes of aliens are excluded from admission because of physical or mental defects or racial origins; persons of similar racial origins or afflicted with like defects may enter the country through birth on its soil. Certain other classes of aliens are subject to deportation because of beliefs, conduct, or potential burden on the community; but we do not deport native-born anarchists, felons, polygamists, prostitutes, paupers, or illiterates. Similar discriminations become apparent on comparing citizenship by birth with citizenship by naturalization; persons of most Asiatic races who can acquire the first are ineligible for the second. And while the alien must be attached to the principles of the Constitution as a prerequisite to obtaining citizenship, the citizen is not required to demonstrate such attachment as a condition of retaining citizenship. Even when the alien has been duly naturalized, he is still not on an equal footing with the native-born citizen,

with respect to eligibility for the Presidency and for Congress, and with respect to freedom to travel; the naturalized citizen risks loss of American nationality through expatriation as a consequence of long-continued residence abroad.

While the problem of ascertaining the Congressional requirements for naturalization is a statutory one, petitioner suggests that these requirements must be construed on the assumption that Congress lacks constitutional power to exact full military service from individuals who have religious scruples against bearing arms.

That assumption is unfounded. The history of the Bill of Rights shows that some states suggested an amendment granting conscientious objectors an exemption from bearing arms and that the first Congress considered a similar proposal. Both failed of adoption. It seems clear, therefore, that the First Amendment's guarantee of religious freedom does not include the right on religious grounds to refuse military service. Petitioner's contention to the contrary involves the obvious *non sequitur* that, since the broader proposal was advisedly rejected, we should read the First Amendment as though it had been adopted.

In view of the existence of the constitutional power to compel military service, the suggestion that the naturalization requirements be read in the light of the legislative exemptions for con-

scientious objectors loses much of its force, particularly in view of the trend to the contrary since 1929 in the naturalization laws. What is left, therefore, is simply another instance of legislative discrimination in favor of citizens, a situation where Congress by statute exacts from an alien a degree of patriotism which it does not similarly exact from a citizen, although it has constitutional power to do so.

III

The 1942 amendments to the Nationality Act of 1940 grant special privileges to aliens who served in the armed forces of the United States in time of war who were not complete conscientious objectors. Petitioner admits that he did not so serve, but contends that the implication of these provisions is that Congress has thereby expressly recognized that the requirements of the oath may be fulfilled by an otherwise qualified alien applicant despite his religious conviction against bearing arms.

But nothing in either the language or the legislative history of the 1942 amendments supports the broad implications which petitioner seeks to draw therefrom. These statutes have the limited purpose of rewarding alien members of the armed forces and alien veterans by facilitating their naturalization. Congress had dealt generally with naturalization in 1940, and had consistently re-

fused to abrogate the rule of the *Schwimmer*, *Macintosh*, and *Bland* cases. We cannot assume that Congress, in dealing with amendments designed to cover only a limited group, intended by silent indirection and without a word of comment to depart from the established rule of exacting from the general body of applicants for citizenship an unqualified promise to bear arms.

The suggestion that the oath cannot mean one thing to an alien veteran and another to an alien non-veteran is, when viewed in the present context, not controlling. A word may have different meanings in different sections of the same act. The argument of consistency moreover breaks down on consideration of the origin of the provision barring complete conscientious objectors from veterans' naturalization benefits.

That proviso dates from similar legislation passed in 1926. Since this was before the decision in the *Schwimmer* case, and since the legislative history is silent as to conscientious objectors generally, it seems reasonable to suppose that the proviso barring the complete conscientious objector from the benefits of the act represented a restrictive amendment rather than one which would broaden the basic statute to include conscientious noncombatants.

It may be that, as a matter of logic, even noncombatant veterans must be excluded if the oath is held to have a rigid meaning in all cases. But

we think that the two can be reconciled. Congress was dealing with what it considered to be two distinct problems, naturalization generally, and naturalization for veterans. As to the former, it insisted that the alien manifest an unqualified willingness to bear arms; as to the veteran, it required only that he should not have been a complete conscientious objector- and did not indicate that it was concerned with the problem generally. The result favors the noncombatant alien veteran over the noncombatant alien non-veteran, a pattern consistent with much else in the naturalization laws.

Petitioner can no more avail himself of the relaxation of the oath for the noncombatant alien veteran than he can claim the benefit of the other statutory waivers included in the 1942 amendments. And the development of the statutory system shows conclusively that Congress had not the slightest intention in 1942 of altering *sub silentio* a consistent rule of general application which for more than ten years it had refused to vary by overt amendment.

IV

In view of the action of Congress in dealing with the arms-bearing requirement, and of its highly significant inaction, that requirement now has an independent legislative basis which can be changed only by Congress and which is not open for reconsideration here.

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This is not a question of common law, or of similar factual situations considered against an equivocal legislative background, or of reconsideration of constitutional doctrine, either independently or in the light of legislative reenactments which necessarily question earlier constitutional decisions. Petitioner here asks the Court to rewrite an Act of Congress in a way that Congress itself has repeatedly refused to do. There is no authority for such action.

This is not to say that we question the soundness of the *Schwimmer*, *Macintosh*, or *Bland* decisions; their wisdom has been confirmed by the national experience since 1929 and 1931.

When those cases were decided, the world was at peace, pacifism was popular, and the denial of citizenship to well-educated individuals because of refusal to bear arms in the highly improbable event of another war accordingly met with predominant professional disapproval. But the question of bearing arms was soon brought into stark immediacy by the logic of events, by the onward march of aggression which struck this country in 1941.

We triumphed in the end because of superior force of arms. We learned once more the lesson that peace and freedom are costly. The liberties which petitioner enjoys along with all the rest were preserved by millions of arms-bearing citizens. While the victory was not won by combatants alone, still the noncombatants were only

auxiliaries, and Congress could reasonably exact a higher degree of service from one asking to join our political society than from those already members of the body politic.

In the light of fifteen years' hindsight, the principle of the *Schwimmer*, *Bland*, and *Macintosh* cases has amply justified itself. After the experience of those years, there is no occasion now to make American citizenship available to one who will not meet the high price that Congress has placed on it.

Argument

The basic question at issue is whether an alien willing to perform noncombatant military service, but unwilling to bear arms may be admitted to citizenship. That question turns on the meaning of the Nationality Act of 1940 as amended. In order to ascertain that meaning, it is necessary at the outset to consider the pertinent legislation in the light of antecedent statutes and of the judicial construction of such antecedent statutes. This is required, not as a mere matter of historical curiosity, but in order to determine whether the rule for which the United States contends is presently based upon legislative enactment, incapable of change except in so far as Congress itself may hereafter amend it, or whether it rests only on judicial decision, subject to being overruled at any time.

Petitioner deals with the 1940 Act without pausing to inquire whether it had reenacted the earlier

statutes together with this Court's interpretations of those statutes (Pet. Br. 9–22), regards the Act as amended generally by implication from amendments designed to reach only a particular class in which he admittedly is not included (Pet. Br. 23–28), and finally seeks to have this Court amend the Act by overruling its decisions dealing with predecessor legislation (Pet. Br. 28–34).

The argument of the United States, on the other hand, considers the basic Nationality Act of 1940 in its proper setting. We point out, first, that the decisions of this Court, holding that, under the earlier legislation, willingness to bear arms in the defense of the United States was a prerequisite for admission to citizenship, were approved by Congress, through acquiescence, through failure to pass amendatory proposals, and finally through reenactment. We then show that the rule is consistent with the basic pattern of other legislation prescribing qualifications for admission to citizenship and that it does not in any conceivable aspect trench upon the domain of the First Amendment. Thereafter we demonstrate that the rule in question was not changed for persons in petitioner's position by the 1942 amendments. And finally, we point out that the earlier decisions are not open for judicial reconsideration because of the intervening legislation approving them, and that in any event their soundness has been confirmed by the verdict of history.

I. CONGRESS IN THE NATIONALITY ACT OF 1940 HAS RE-ENACTED THE RULE THAT A WILLINGNESS TO BEAR ARMS IN DEFENSE OF THE UNITED STATES IS A PREREQUISITE FOR ADMISSION TO AMERICAN CITIZENSHIP

A. *The decisions of this Court holding that an alien's willingness to bear arms in defense of the United States was a prerequisite for admission to citizenship were well known and widely discussed*

In *United States* v. *Schwimmer*, 279 U. S. 644, *United States* v. *Macintosh*, 283 U. S. 605, and *United States* v. *Bland*, 283 U. S. 636, this Court construed Section 4 of the Naturalization Act of June 29, 1906 (*infra*, pp. 69–70), and held that an alien unwilling without qualification to bear arms in defense of the United States was not entitled to citizenship. The Court held that the requirements of subdivision Third of the cited section, requiring the applicant to declare on oath that he would support and defend the Constitution of the United States against all enemies, foreign and domestic, and of subdivision Fourth, that he must be attached to the principles of the Constitution of the United States, were not satisfied unless the applicant was willing unreservedly to bear arms in the event of war. Three members of the Court dissented in the case of *Schwimmer*, four members in the cases of *Macintosh* and *Bland*.

As petitioner contends (Pet. Br. 29–33), the *Schwimmer* and *Macintosh* cases may be distinguished from the present case on their facts.

Mme. Schwimmer was "an uncomprising pacifist", opposed to any form of military force, and stated moreover that she had "no sense of nationalism, only a cosmic consciousness of belonging to the human family." 279 U. S. at 648. Dr. Macintosh reserved the right to make an individual determination of the moral justification of a particular war, 283 U. S. at 617–619. It is, however, impossible so to distinguish the *Bland* decision. There the applicant for citizenship, who had actually spent nine months nursing soldiers in France after World War I, expressed her willingness to defend the country "as far as my conscience as a Christian will allow," and it was evident, as Chief Justice Hughes pointed out in his dissenting opinion, that her reservations related to her religious scruples against bearing arms. (See also the opinion of the Second Circuit holding that Miss Bland could properly take the oath, 42 F. 2d 842.) This Court ruled that she was nevertheless ineligible for citizenship because she would not unqualifiedly agree to bear arms in defense of the United States.

Quite apart from particular factual distinctions, the three cases were generally understood, then and since, as laying down a broad general rule. See *In re Summers*, 325 U. S. 561, 572: "The United States does not admit to citizenship the alien who refuses to pledge military service." And that broad rule was well known and widely discussed, in legal periodicals (Petition for certio-

rari, p. 17) and elsewhere. See Hearings before the House Committee on Immigration and Naturalization on H. R. 3547, 71st Cong., 1st sess., pp. 130–133; Hearings before same on H. R. 297, 72d Cong., 1st sess., pp. 215–225. The circumstance that, as petitioner suggests (Pet. 17), professional comment was preponderantly adverse, indicates that the arms-bearing requirement laid down in those decisions became and doubtless remained a burning issue with significant and articulate sections of the community. We stress this point, not with any purpose of reopening the battle of the law reviews and the other journals of opinion; they simply show that the decisions in question were not mere technical rulings, of interest only to the parties and to specialized practitioners, but were widely known inside and outside the ranks of the legal profession. In such a setting the assumption that Congress must be presumed to have known of these cases is of course more than an improbable hypothesis useful as a canon of construction; it has a substantial basis in fact.

B. *The decisions of this Court holding that an alien's willingness to bear arms in defense of the United States was a prerequisite for admission to citizenship were approved by Congress, through acquiescence and through repeated refusal to enact legislation overturning those decisions.*

For over eleven years, from May 1929, the date of the *Schwimmer* decision, until October 1940,

when it enacted the Nationality Act of 1940 and repealed the earlier provisions considered in the *Schwimmer* and successor cases, Congress took no step to indicate disagreement with the arms-bearing requirement for naturalization. We point out below, pp. 23–30, that the requirement was re-enacted in 1940; here we show that this long acquiescence, even in the absence of reenactment, amounts to an approval.

1. Congress undertook no affirmative change in the law. It had knowledge, from judicial decisions published in the reports, that the state and lower federal courts were following and applying the rule enunciated by this Court. *Clarke's Case*, 301 Pa. 321; *Beale* v. *United States*, 71 F. 2d 737 (C. C. A. 8); *In re Warkentin*, 93 F. 2d 42 (C. C. A. 7), certiorari denied *sub nom. Warkentin* v. *Schlotfeldt*, 304 U. S. 563; see *In re Aldecoa*, 22 F. Supp. 659 (D. Idaho). And it could have ascertained that this Court in 1938 had refused to reconsider its earlier decisions despite the insistence of the petitioner in the *Warkentin* case that it do so. See Pet. in No. 881, Oct. T. 1937, at pp. 7, 25.

2. Between the time of the *Schwimmer* decision, in 1929, and the enactment of the comprehensive revision of the naturalization laws known as the Nationality Act of 1940, Congress on numerous occasions amended the statutes which prescribed the qualifications for admission to citizenship. We collect the pertinent legislation in the

margin.[1] Not one of these amendments dealt with the requirement that the alien seeking admission to citizenship must be unqualifiedly willing to bear arms in behalf of his adopted country.

3. Finally, and we think this circumstance of vital significance, Congress over a period of more than ten years consistently refused to enact bills which would have eliminated the requirement. H. R. 3547, 71st Cong., 1st sess., 71 Cong. Rec. 2184; H. R. 297, 72d Cong., 1st sess., 75 Cong. Rec. 95; H. R. 298, 72d Cong., 1st sess., 75 Cong. Rec. 95; S. 3275, 72d Cong., 1st sess., 75 Cong. Rec. 2600; H. R. 1528, 73d Cong., 1st sess., 77 Cong. Rec. 90; H. R. 5170, 74th Cong., 1st sess., 79 Cong. Rec. 1356; H. R. 8259, 75th Cong., 1st sess., 81 Cong. Rec. 9193; S. 165, 76th Cong., 1st sess., 84 Cong. Rec. 67. The proposal was continuously before Congress from May 29, 1929, two

[1] Act of June 21, 1930, c. 559, 46 Stat. 791; Act of July 3, 1930, c. 835, 46 Stat. 854; Act of February 14, 1931, c. 118, 46 Stat. 1087; Act of March 3, 1931, c. 442, 46 Stat. 1511; Act of May 25, 1932, c. 203, 47 Stat. 165; Act of June 28, 1932, c. 283, 47 Stat. 336; Act of July 2, 1932, c. 395, 47 Stat. 571; Act of April 19, 1934, c. 154, 48 Stat. 597; Act of May 24, 1934, c. 344, 48 Stat. 797; Act of June 15, 1935, c. 255, 49 Stat. 376; Act of June 24, 1935, c. 288, 49 Stat. 395; Act of June 25, 1936, c. 801, 49 Stat. 1917; Section 3 of the Act of July 30, 1937, c. 545, 50 Stat. 547, 548–549; Act of August 23, 1937, c. 735, 50 Stat. 743; Joint Resolution of June 29, 1938, c. 819, 52 Stat. 1247; Act of June 29, 1938, c. 822, 52 Stat. 1249; Act of June 20, 1939, c. 224, 53 Stat. 843; Act of June 21, 1939, c. 234, 53 Stat. 851; Act of August 9, 1939, c. 610, 53 Stat. 1273; Act of July 1, 1940, c. 495, 54 Stat. 707; Act of July 2, 1940, c. 509, 54 Stat. 715; Act of August 16, 1940, c. 684, 54 Stat. 788.

days after the decision in the *Schwimmer* case, through the life of the Congress which enacted the Nationality Act of 1940.

The basic pattern of all these measures was that of H. R. 297, 72d Cong., 1st sess., *supra*, introduced by Mr. Griffin at the first session of Congress after the *Macintosh* decision, which was entitled "A Bill to provide that religious views or philosophical opinions against war shall not debar aliens, otherwise qualified, from becoming citizens." In pertinent part, it provided that the Fourth subdivision of Section 4 of the Act of June 29, 1906 (*supra*, p. 15) should be amended by adding the following sentence:

> Except that no person mentally, morally, and otherwise qualified shall be debarred from citizenship by reason of his or her religious views or philosophical opinions with respect to the lawfulness of war as a means of settling international disputes, but every alien admitted to citizenship shall be subject to the same obligation as the native-born citizen.[2]

Hearings were had before the House Committee on Immigration and Naturalization on H. R. 3547, 71st Cong., 1st sess., and on H. R. 297, 72d Cong., 1st sess., in May 1930 and January 1932, respectively. The proponents of these bills, among whom were included representatives of religious

[2] H. R. 3547, 71st Cong., 1st sess., and H. R. 298, 72d Cong., 1st sess., differed only in the circumstance that they omitted the last clause, beginning "but every alien." The former bill was introduced two days after the *Schwimmer* decision had been handed down.

groups, stated clearly their purpose to overrule the interpretation placed on the oath by the *Schwimmer* and *Macintosh* cases. Hearings on H. R. 3547, pp. 12, 22, 29–57, 73–109, 169–180; Hearings on H. R. 297, pp. 4–7, 10, 12, 15–19, 41–48, 53–56, 66–81, 147, 148. There was opposition on each occasion. Hearings on H. R. 3547, pp. 57–65, 73, 146–169, 181–212; Hearings on H. R. 297, pp. 85–140. Neither bill was reported out.

Bills identical with H. R. 297 were introduced in three later Congresses; these, likewise, never emerged from the files of the committee: H. R. 1528, 73d Cong., 1st sess.; H. R. 5170, 74th Cong., 1st sess.; H. R. 8259, 75th Cong., 1st sess. The other proposals which failed of passage, though they differed in certain minor particulars which we note in the margin,[3] met a like fate: death in committee.

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[3] S. 3275, 72d Cong., 1st sess., "A Bill to permit naturalization of alien conscientious objectors," proposed to amend subdivision Fourth of Section 4 of the Act of 1906 by adding "but an alien otherwise qualified shall not be denied citizenship under any provisions of this Act solely by reason of his refusal on conscientious grounds to promise to bear arms or otherwise participate in war: *Provided*, That nothing in the foregoing provisions shall be construed to affect the obligations of aliens after their admission to citizenship."

S. 165, 76th Cong., 1st sess., "A Bill authorizing the naturalization of certain aliens", provided "That any female alien, otherwise eligible for citizenship under the naturalization laws, shall not be denied a certificate of citizenship for the reason that such alien is conscientiously opposed to war as a method of settling international controversies or has expressed an unwillingness to serve in the armed forces of the United States in time of war with a foreign country."

Thus, for six successive Congresses, over a period of more than a decade, there were continuously pending before the national legislature, in one form or another, proposals looking to the legislative overruling of the doctrine of the *Schwimmer, Macintosh,* and *Bland* cases. That Congress declined to enact these proposals, after hearings and after speeches advocating the change (72 Cong. Rec. 6966–6967; 75 Cong. Rec. 15354–15357), speeches which praised the dissenting opinions, seems to us conclusive proof that the prevailing opinions in this Court reflected the prevailing opinion in the Congress.

4. We think it clear, therefore, that Congress approved the rule laid down in the *Schwimmer, Macintosh* and *Bland* cases, through its acquiescence in the consistent course of judicial decision, through its failure to change the arms-bearing requirement while changing many other requirements of the naturalization laws, and, finally, through its failure to pass bills which would have permitted the naturalization of alien conscientious objectors. As the Court said in *Beale* v. *United States, supra,* affirming an order refusing to admit to citizenship a person unwilling to bear arms because of conscientious reasons (71 F. 2d at 739):

> * * * having in mind that Congress is vested with the power and authority to fix and determine the conditions upon which

> the privilege of citizenship may be conferred, it is worthy of note that there have been no amendments affecting the provisions of the statutes relating to the requirements for the admission to citizenship. We must conclude, therefore, that these statutory requirements as construed by the Supreme Court have congressional sanction and approval.

Compare *United States* v. *Midwest Oil Co.*, 236 U. S. 459.

C. *The rule that an alien's willingness to bear arms in defense of the United States is a prerequisite for admission to citizenship was reenacted by Congress in 1940*

As we have shown, *supra*, pp. 15–16, the Court in the *Schwimmer*, *Macintosh*, and *Bland* case dealt with subdivisions Third and Fourth of Section 4 of the Naturalization Act of 1906 (*infra*, pp. 69–70), and with a form of oath which had been administratively prescribed by Rule 8 (c) of the Naturalization Regulations of July 1, 1929.

Subdivision Third provided that before an applicant could be admitted to citizenship, he must "declare on oath in open court * * * that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same"; subdivision Fourth required that it must be made to appear to the satisfaction of the court that during the five years preceding the

application, "he has behaved as a man * * * attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

Those subdivisions were repealed by Section 504 of the Nationality Act of 1940 (8 U. S. C. 904), and were replaced, respectively, by Sections 335 (a) and 307 (a) of the subsequent enactment (8 U. S. C. 735 (a), 707 (a)), which, with minor variations in language, enact the same requirements.

Section 335 (a) (*infra*, p. 65), provides that before an applicant for naturalization shall be admitted to citizenship, he shall take an oath in open court that, *inter alia*, he will "support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic, and * * * bear true faith and allegiance to the same." Section 307 (a) of the Nationality Act of 1940 (*infra*, p. 63), provides that no person shall be naturalized unless for a period of five years preceding the filing of his petition for naturalization he "has been and still is a person * * * attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

Moreover, the oath which previously had been administratively prescribed, and whose non-statutory basis had been inferentially criticized

by the dissenting minority in the *Macintosh* case,[4] was given statutory sanction; the exact language of the former oath was legislatively adopted by Section 335 (b), *infra*, pp. 65–66.

By thus reenacting in every pertinent particular the substance of the statutory provisions considered in the earlier decisions, and by giving statutory authority to an oath theretofore required only by regulation, Congress readopted and reenacted the rule of the cases in question, that an alien applicant seeking citizenship must express without reservation his willingness to bear arms in defense of the United States. This is the more evident when it is considered that in the Nationality Act of 1940 Congress altered many other existing requirements of law and added many new ones. See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 488–489; *Missouri* v. *Ross*, 299 U. S. 72, 75; *United States* v. *Elgin, J. & E. Ry.* 298 U. S. 492, 500; *United States* v. *Ryan*, 284 U. S. 167–175; cf. *Helvering* v. *Winmill*, 305 U. S. 79, 82–83. As the present Chief Justice said in the *Apex Hosiery Co.* case (310 U. S. at 488–489):

> * * * The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as ef-

[4] "It must be conceded that departmental zeal may not be permitted to outrun the authority conferred by statute." *Per* Hughes, C. J., 283 U. S. at 627.

> fective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, as here, the application of the statute * * * has brought forth sharply conflicting views on the Court and in Congress, and where after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute.

As we have indicated, petitioner avoids the effect of this reenactment by saying nothing about it; the only argument against the effect of the Nationality Act of 1940 is that made by the dissenting judge below. Judge Woodbury said (R. 27–28):

> Following these decisions Congress passed the Nationality Act of 1940 (54 Stat. 1137) "To revise and codify the nationality laws of the United States into a comprehensive nationality code." By it Congress did not alter the terms of the oath of allegiance and so by inference it might be said to have adopted the interpretation placed upon the oath by the Supreme Court in the cases just referred to. But this inference seems to me to lose persuasive force by reason of the fact that Congress in its revision and codification did not include, when adding many new requirements for eligibility to citizenship by naturalization, a specific one of willingness to bear arms, but instead permitted that requirement still

to stand on an interpretation of the oath of allegiance by a closely divided court. It seems to me in consequence that no persuasive inference of Congressional adoption of the judicial interpretation of the oath of allegiance in the *Schwimmer, Macintosh* and *Bland* cases can safely be drawn from the Nationality Act of 1940. It seems to me that the permissible inferences from that statute neutralize one another.

The most obvious answer to this view is that Congress did not find it necessary to add the arms-bearing requirement for the reason that it was already included. Congress said nothing about it because there was nothing Congress needed to say. The House Report on the bill, H. Rep. 2396, 76th Cong., 3rd sess., was filed on June 5, 1940, nine days after the decision in *Apex Hosiery Co.* v. *Leader, supra.* The most painstaking lawyer in Congress, had he been tempted to doubt the reenactment rule, would have found confirmation thereof in the quotation just set forth. He could thus confidently have assumed that the rule of the *Schwimmer, Macintosh,* and *Bland* cases had been reenacted, particularly since the controversial oath had been put on a statutory foundation.

Nor can we agree with the suggestion of Judge Woodbury that decisions by a closely divided court are to be treated as though they were affirmances by an equally divided court, at least until Congress with a species of "me-too" legislation comes to the

support of the prevailing opinon. Here Congress for more than ten years refused to enact the substance of the dissents. We submit that in those circumstances there is no possible countervailing inference to be drawn from the Act.

The legislative history of the Nationality Act of 1940 is far from suggesting that, in a world where aggressors were already on the loose, the requirement that applicants for citizenship must promise to bear arms was to be left in suspense to await the appeal of the dissenting opinions to the brooding spirit of the law or to the intelligence of a future day. Cf. Hughes, *The Supreme Court of the United States*, 67–68. We cannot assume that Congress intended to leave open a question which for over ten years had been settled, and in respect of which it had consistently refused to take action.

The Nationality Act of 1940, as the reports indicate (S. Rep. 2150, 76th Cong., 3d sess., p. 2), was originally drafted under the direction of a presidential committee consisting of the Secretary of State, the Attorney General, and the Secretary of Labor. Their labors culminated in a draft code which was submitted to Congress on June 13, 1938. See Codification of the Nationality Laws of the United States, in 3 parts, House Committee Print, 76th Cong., 1st sess.; Hearings before the House Committee on Immigration and Naturalization, 76th Cong., 1st sess., on H. R. 6127 superseded

by H. R. 9980, pp. 405–692. After extensive hearings, *ibid.*, the bill was reported out with the comment, *inter alia* (H. Rep. 2396, 76th Cong., 3rd sess., p. 2), that—

> The proposed code represents a studied effort to draft a measure that would conform to the constitutional requirements—that the rules of naturalization be uniform and facilitate the naturalization of worthy candidates and, at the same time, protect the United States against adding to its body of citizens persons who would be a potential liability rather than an asset.

The Senate Report, filed September 23, 1940 (S. Rep. 2150, 76th Cong., 3d sess., p. 2), noted that "The proposed revision will greatly strengthen the laws of the United States concerned with the national defense."

These several reports, in the light of the notoriety of the *Schwimmer, Macintosh,* and *Bland* cases, and against the background of the settled rule of Congressional approval through acquiescence and reenactment, certainly lend no support to the suggestion that Congress in 1940, at a time when our own national safety was recognized to be in danger, meant to leave the arms-bearing requirement open for future judicial reconsideration. It cannot be supposed that the legal members of the Presidential drafting committee, who presumably were aware of the con-

sistent refusal of Congress to pass bills which would have enacted the dissenting opinions in those cases (*supra,* pp. 19–22), and who recommended legislative enactment of the former administrative oath (Codification of the Nationality Laws, part 1, p. 48, comment under draft sec. 334 (b); Hearings, *supra,* p. 467), intended *sub silentio* to permit the then recognized content of the oath to remain open to change. True, they did not comment specifically on the meaning which that oath had received; there was no need to, and we can properly assume that they were sound enough lawyers not to belabor the obvious.

We think it clear, therefore, that whatever the original meaning of the oath, whatever the additional sanction that it received through Congressional acquiescence, it stood on a new and independent legislative footing as a result of the enactment of the Nationality Act of 1940.

II. THE RULE THAT AN ALIEN APPLICANT FOR CITIZENSHIP MUST BE WILLING TO BEAR ARMS IN DEFENSE OF THE UNITED STATES IS CONSISTENT WITH THE BASIC PATTERN OF OTHER LEGISLATION DEALING WITH IMMIGRATION AND NATURALIZATION, AND DOES NOT CONFLICT WITH THE FIRST AMENDMENT IN ANY CONCEIVABLE ASPECT

Petitioner admits (Pet. Br. 9) that "naturalization is a privilege that may be granted or withheld at the sole discretion of the Congress." But he argues that generalized expressions in the naturalization laws are to be construed so as to

put the applicant for citizenship on a parity with the citizen (Pet. Br. 11–22), and, moreover, that they are to be construed in conformity with the First Amendment, which he assumes to include an exemption from military services on religious grounds (Pet. Br. 19–21).

We start from the same premise, the undoubted competence of Congress to prescribe conditions for naturalization. But, as we show that petitioner's other assumptions are not well founded, we reach a different result. We examine the Constitutional and statutory provisions governing the admission and expulsion of aliens, and the grant of citizenship by birth and through naturalization. We show that the existing law, in numerous vital respects, consistently discriminates in favor of the citizen against the alien, and in favor of the native-born citizen against the naturalized citizen. We show that the First Amendment does not guarantee exemption from military service on religious grounds, and that additional limiting amendments which proposed to grant such an exemption failed of adoption. We conclude, accordingly, that the refusal to confer citizenship upon an alien willing to perform only noncombatant service, while calling on the citizen for no greater contribution, involves no constitutional deprivation, and amounts at most to a statutory discrimination in favor of the citizen similar to many

others which have long been embedded in the statute book.

A. *Naturalization is a matter of statute, not of constitutional right*

The only Constitutional provision here in question is that part of Section 8, Article I, which gives Congress power "To establish an uniform Rule of Naturalization." So long as the rules established are uniform, so long as an alien with certain qualifications in Maine is treated on an equality with aliens having the same qualifications in Montana, the constitutional mandate is satisfied. Compare *The Federalist*, No. XLI.

Beyond that, the qualifications are for Congress to prescribe; it can condition the offer of the privilege as it sees fit. This rule, which petitioner does not question directly, is supported by a long line of authority. *Maney* v. *United States*, 278 U. S. 17, 22; *Zartarian* v. *Billings*, 204 U. S. 170, 175; *United States* v. *Ginsberg*, 243 U. S. 472, 475; *Luria* v. *United States*, 231 U. S. 9, 23.

The question for this Court is not, as Mr. Justice Holmes asserts in his dissenting opinion in the case of *Schwimmer*, one of what principles we should adhere to in admitting to citizenship, 279 U. S. at 655; rather it is, as Chief Justice Hughes correctly points out in his *Macintosh* dissent, a matter of what Congress has actually required. 283 U. S. at 627.

B. *The whole fabric of our immigration and naturalization laws negatives petitioner's contention that he is entitled to stand on a basis of equality with citizen conscientious objectors*

Petitioner states (Pet. Br. 23) that "in declaring allegiance to the Government of the United States he is willingly submitting himself to the same subjection to the powers of the government as the native born citizen is under. He is not attempting to 'conclude the Government' or 'stay its hand'. He only wishes to be placed on a par with the natural born citizen and not come in on an unequal footing."

Elsewhere, too, it seems to have occasioned surprise that the *Schwimmer* case and the decisions following it "require of the applicants for citizenship a higher degree of patriotism than we require of native-born citizens." See *In re Losey*, 39 F. Supp. 37, 38 (E. D. Wash.); compare the ruling of the district court in the present case (R. 13).

But the Constitution and laws of the United States, whether rightly or wrongly we need not now pause to consider, have never put aliens and citizens on a parity. The individual entering the United States by birth and thus becoming a citizen thereof is in numerous important respects favored over the alien who seeks to enter the United States, over the alien who once admitted seeks to remain therein, and over the alien who

admitted and remaining therein seeks to become a citizen thereof.

1. Aliens who are idiots, imbeciles, feeble-minded, epileptic or insane, aliens who are afflicted with tuberculosis or with a loathsome or dangerous contagious disease, and aliens who may otherwise be classed as mentally or physically defective, are excluded from admission to the United States. 8 U. S. C. 136 (a), (c), (d). Unfortunates born in the United States with similar disabilities are not excluded and acquire American citizenship at birth. Amendment XIV, Sec. 1.

The Chinese were, for many years excluded from admission to the United States for purposes of permanent residence, until December 1943. 8 U. S. C., 1940 ed., ch. 7; Act of December 17, 1943, c. 344, 57 Stat. 600. Other Asiatics are still excluded. 8 U. S. C. 136 (n). But a Chinese or a Japanese child born in the United States acquires American citizenship. *United States* v. *Wong Kim Ark*, 169 U. S. 649; cf. *Yasui* v. *United States*, 320 U. S. 115.

2. Aliens lawfully admitted to the United States are subject to deportation if at any time after admission they become anarchists, opposers of organized government, or advocates of violent overthrow of the government and of like doctrines. 8 U. S. C. 137. Similarly, all aliens brought to the United States in violation of law are subject to deportation, with exceptions not here material,

8 U. S. C. 154, 155; this includes, in addition to the classes already mentioned, persons convicted of crimes involving moral turpitude, 8 U. S. C. 136 (e); polygamists, 8 U. S. C. 136 (f); prostitutes and the like, 8 U. S. C. 136 (g); persons likely to become a public charge, 8 U. S. C. 136 (i); and persons over sixteen years of age, physically capable of reading, who are illiterate. 8 U. S. C. 136 (o). Much similar conduct involves deportation even after lawful entry, 8 U. S. C. 155. Here again, there is a discrimination in favor of citizens; we do not deport native-born anarchists, felons, polygamists, prostitutes, paupers, or illiterates.

3. Similar discriminations are apparent when the grant of citizenship by naturalization is compared with the grant of citizenship by birth. For those born in the United States, citizenship is acquired by birth, regardless of race. Amend. XIV, Sec. 1; *United States* v. *Wong Kim Ark*, 169 U. S. 649; cf. Amend. XV. But we deny the privilege of citizenship by naturalization to high-caste Hindus, *United States* v. *Thind*, 261 U. S. 204, and to Japanese, *Ozawa* v. *United States*, 260 U. S. 178; *Yamashita* v. *Hinkle*, 260 U. S. 199; *Toyota* v. *United States*, 268 U. S. 402, while the right of Filipinos to become American citizens turns on whether or not they have served in the armed forces of the United States in enumerated wars. 8 U. S. C. Supp. IV, 703.

Certain other requirements—that the applicant speak English (8 U. S. C. 704), and that he be attached to the principles of the Constitution (8 U. S. C. 707 (a))—requirements which obviously could not be met by one obtaining citizenship by birth, we do not dwell upon, since they presumably would not apply to minor children below the age of understanding who acquire citizenship through a parent's naturalization. Compare 8 U. S. C. 713–716, 735 (a), 739. But it may be well to note in passing that while the alien is required to be attached to the principles of the Constitution as a prerequisite to obtaining citizenship, see 8 U. S. C. 707 (a), the native-born citizen is not required to prove such attachment as a condition to retaining citizenship.

4. And finally, once the alien has been duly naturalized, he is still not on an equal footing with the native-born citizen. He can never be President. U. S. Const., Art. II, Sec. 1, cl. 5. He must wait seven years before he is eligible to be a Representative in Congress, Art. I, Sec. 2, cl. 2, and nine years before he can be a Senator. Art. I, Sec. 3, cl. 3. And whatever may be the present status of the long-established rule that he holds his citizenship upon the condition that it may be subsequently challenged, see *United States* v. *Ginsberg*, 243 U. S. 472, 475, certain it is that in view of the law as to expatriation he has not the same freedom as the native-born citizen to change his residence.

The provision that a naturalized American citizen, returning to the land of his birth and remaining there for a stated period *animus manendi*, thereby expatriates himself, is first found in the so-called Bancroft treaties.[5] Thereafter it was made universally applicable to naturalized citizens returning to all countries of origin. Section 2 of the Act of March 2, 1907, 34 Stat. 1228. But there was only a presumption of expatriation; "it is a matter of option and intention." *United States* v. *Gay*, 264 U. S. 353, 358. In the face of the Government's obligation to accord to naturalized citizens abroad the same protection that it extends to native-born citizens, R. S. 2000; 8 U. S. C. 903a, the presumption rule broke down in practice. See Codification of the Nationality Laws of the United States, *supra*, part 1, pp. 69–76, notes under draft Sec. 402; Hearings on the Nationality Act, *supra*, pp. 493–501. Accordingly, the Nationality Act of 1940 prescribes that, subject to stated exceptions, the naturalized citizen loses his American nationality entirely by resid-

[5] Art. IV of the Treaty of February 22, 1868, with the King of Prussia in the name of the North German Confederation, 15 Stat. 615, 616; Art. IV of the Treaty of May 26, 1868, with Bavaria, 15 Stat. 661, 662 (but see Art. III of the Protocol, 15 Stat. at 664–666); Art. IV of the Treaty of July 27, 1868, with Wurttemberg, 16 Stat. 735, 736; Art. IV of the Treaty of August 1, 1868, with Hesse, 16 Stat. 743, 745. See also Art. III of the Treaty of January 22, 1873, with Denmark, 17 Stat. 941, 942–943. Compare Art. III of the Treaty of May 13, 1870, with Great Britain, 16 Stat. 775, 776.

ing abroad for a period varying from two to five years. Sections 404–406; 8 U. S. C. 804–806. The native-born citizen is not under the same restraint, and, subject only to a presumption of expatriation in two instances—Sections 402, 401 (c), (d); 8 U. S. C. 802, 801 (c), (d)—can wander about the globe at will and settle down anywhere, for any length of time, without danger of losing his citizenship. *Cf. Perkins* v. *Elg*, 307 U. S. 325, 329.

We have gone thus fully into these distinctions because we consider them essential to a clear understanding of what is involved here—understanding that is befogged by petitioner's insistence that he stand on a basis of equality with the citizen, understanding that has similarly been clouded over by the uncritical acceptance in many quarters of Mr. Justice Holmes' *Schwimmer* dissent, which fails to distinguish what Congress has demanded for citizenship from what Congress should demand, and which analogizes the admission into citizenship to the deportation of aliens and the expulsion of citizens. 279 U. S. at 655.

C. *The freedom of religion guaranteed by the First Amendment does not include an exemption on religious grounds from military service or from the duty of bearing arms*

While, as we have indicated, the question here is purely statutory, a problem of ascertaining what qualifications Congress has required of ap-

plicants for citizenship, petitioner's argument is permeated with the suggestion that Congress lacks constitutional power to exact full military service from individuals who have religious scruples against bearing arms (Pet. Br. 14–22). The dissenting judge below seems to have felt that the requirement imposed here was somehow lacking "in conformity with the First Amendment" (R. 33). And a similar doubt has inevitably conditioned all thinking on the problem. It is not without significance that while this Court in the *Macintosh* case emphatically pointed out that "The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress," 283 U. S. at 624, the implications of the Chief Justice's strong dissent were definitely to the contrary, notwithstanding his preliminary assumptions, 283 U. S. at 627.

We think it may be helpful, therefore, in considering the problem of the extent to which Congress has conditioned naturalization, to consider as well the extent of the Congressional power to exact military service. That issue is a narrow one: Has the native-born conscientious objector a constitutional right, in view of the First Amendment, to be exempted from bearing arms?

In the *Macintosh* case, this Court, as above noted, answered the question in the negative. 283 U. S. at 623–624. We believe that an examination

of the history of the First Amendment will demonstrate the soundness of that conclusion.

As petitioner shows (Pet. Br. 14–15), Rhode Island, Pennsylvania, Virginia, and North Carolina, proposed an additional limiting amendment, at the time of the ratification of the Constitution, which would have placed the arms-bearing exemption of the conscientious objector beyond the reach of legislation. That proposed amendment read (1 Elliot's Debates 334–335; 2 *id.* 331; 3 *id.* 657–659; 4 *id.* 243–244):

> That any person religiously scrupulous of bearing arms is to be exempted upon payment of an equivalent to employ another to bear arms in his stead.

Petitioner likewise shows (Pet. Br. 15) that James Madison on June 8, 1789, presented to the House of Representatives a proposed list of amendments to the Constitution, from which ultimately emerged the present Bill of Rights. 1 Annals of Congress 434. As reported to the House on August 17 (1 Annals of Congress 749), the list included a fourth proposition which in time became the Second Amendment; it was as follows:

> A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed: *but no person religiously scrupulous shall be compelled to bear arms.* [Italics added.]

The words "in person" were added to the italicized clause, 1 Annals of Congress, 766–767, but, as is well known, the entire clause as thus amended was eliminated before the proposal was submitted to the States.

The issue was sharply defined in the debates. Mr. Boudinot, who supported the exemption, said (p. 767):

> Now, by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms.

Per contra (p. 751):

> Mr. Benson moved to have the words "but no person religiously scrupulous shall be compelled to bear arms," struck out. He would always leave it to the benevolence of the Legislature, for, modify it as you please, it will be impossible to express it in such a manner as to clear it from ambiguity. No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government * * *.

We think it clear, from this significant excision from the Second Amendment, and from the failure to adopt the substantially similar provision proposed by four states, *supra*, p. 40, that the guarantee of religious freedom in the First Amendment does not include the right to refuse to bear arms on religious grounds. It follows that

the opinion of this Court on that point in the *Macintosh* case (283 U. S. at 623–624) correctly reflects the views of the Founders.*

*It is interesting to note that Roger Williams, the pioneer of religious liberty in the United States, defined liberty of conscience in terms that required all to contribute to the common defense. See his famous "Parable of the Ship of State", written in 1655:

"There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or a human combination or society. It hath fallen out sometimes, that both papists and protestants, Jews and Turks, may be embarked in one ship; upon which proposal I affirm, that all the liberty of conscience, that ever I pleaded for, turns upon these two hinges—that none of the papists, protestants, Jews, or Turks, be forced to come to the ship's prayers and worship, nor compelled from their own particular prayers or worship, if they practice any. I further add, that I never denied, that notwithstanding this liberty, the commander of this ship ought to command the ship's course, yea, and also command that justice, peace and sobriety be kept and practiced, both among the seamen and all the passengers. If any of the seamen refuse to perform their services, or passengers to pay their freight; if any refuse to help, in person or purse, toward the common charges or defence; if any refuse to obey the common laws and orders of the ship, concerning their common peace and preservation; if any shall mutiny and rise up against their commanders and officers; if any should preach or write that there ought to be no commanders or officers, nor corrections nor punishments, no laws nor orders, I never denied, but in such cases, whatever is pretended, the commander or commanders may judge, resist, compel and punish such transgressors, according to their deserts and merits." [Letter, To the Town of Providence, in 6 Williams, *Collected Works* (Narragansett Club ed. 1866–1874), 278 *et seq.*, reprinted in Ernst, *The Political Thought of Roger Williams*, 74.]

Petitioner badly misreads the sequence of events when he suggests (Pet. Br. 15) that the rejected clause was merged into the present First Amendment, a misreading which necessarily colors much of his subsequent argument (Pet. Br. 13–21).

There may well be instances, of course, where the rejection of a particular clause or section can be explained on the ground that it was surplusage or mere redundancy. But that was not the case here. Here the rejected proposition would have limited the power of the United States. It failed of adoption. Consequently the power of the United States was not so limited. What petitioner is really saying, therefore, is that since the proposal was advisedly rejected, we should read the First Amendment as though it had been adopted. It would be difficult to imagine a more obvious *non sequitur*.

But it is argued that because Congress had always made concessions to conscientious objectors in its military legislation, from the Militia Act of 1792 down in unbroken line to the Selective Training and Service Act of 1940, it must be taken to have made a like concession with respect to conscientiously objecting aliens who seek citizenship.

The unbroken line of legislation is not, of course, an argument against the existence of constitutional power. The circumstance that conscientious objectors are legislatively exempted does not show lack of power to abrogate the ex-

emption. Constitutional grants do not atrophy through non-user. Much of the judicial power conferred by Article III has yet to be exerted, and even in our own day we have witnessed the far-reaching scope of the commerce power once Congress sees fit to employ its latent sweep. *Cf. Mabee* v. *White Plains Publishing Co.*, No. 57, this Term, decided February 11, 1946.

Petitioner's final contention is that the oath in the naturalization laws should be interpreted in the light of this current of Congressional tenderness for the conscientious objector in militia and conscription laws. Whatever may have been the original force of this argument, it fails at the present time; there has been a counter trend in the field of naturalization, where for over sixteen years conscientious objectors have not been eligible for citizenship. And, as we have pointed out above, Congress has not only approved and reenacted this latter trend, but it has refused to abandon it. *Supra,* pp. 17–30.

What is left, therefore, is a situation where Congress by statute exacts from an alien a requirement which it does not similarly exact from a citizen, though it has constitutional power to do so. The resultant discrimination is a matter of legislative policy, no different from the general statutory scheme, *supra,* pp. 34–38, which discriminates in favor of the citizen in many other instances as well.

III. PETITIONER DOES NOT COME WITHIN THE 1942 AMENDMENTS TO THE NATIONALITY ACT OF 1940 WHICH PERMIT NATURALIZATION OF NONCOMBATANTS WHO HAVE SERVED IN THE ARMED FORCES

In 1942, amendments to the Nationality Act of 1940 granted special privileges in respect of naturalization to aliens who served in the armed forces of the United States in time of war by eliminating or changing the requirements as to declaration of intention, period of residence, education, and fees. Act of March 27, 1942, c. 199, sec. 1001, 56 Stat. 176, 182, adding Title III to the Nationality Act of 1940, 8 U. S. C., Supp. IV, 1001–1005; Act of December 7, 1942, c. 690, 56 Stat. 1041, adding Section 323a to the Nationality Act of 1940, 8 U. S. C., Supp. IV, 723a; both *infra*, pp. 66–68, 63–65. The Act of March 27, 1942, which applies to persons serving in the present war, specifically provides that its benefits shall not be available to "any conciention objector who performed no military duty whatever or refused to wear the uniform"; the Act of December 7, 1942, for the benefit of those with service on the Mexican Border and during World War I, is restricted to a person "who was not a conscientious objector who performed no military duty whatever or refused to wear the uniform."

Petitioner admits (Pet. Br. 25) that he "cannot take advantage of the special provisions of these two amendments since he has never served in the armed forces. But he does not invoke those sections directly." He argues that "the

important feature of the 1942 legislation is that Congress, without abrogation or modification of the statutory requirements as to oath and attachment to the principles of the Constitution has expressly recognized that such requirements may be fulfilled by an otherwise qualified alien applicant despite his religious conviction against bearing arms" (Pet. Br. 26).

This argument was rejected below, we submit rightly so. As the circuit court of appeals said (R. 26–27):

> Congress, we think, in passing this amendment,[1] intended to reward the conscientious objectors who had served or were serving in the armed forces by allowing them to take an oath which did not conflict with their religious scruples. It has passed no legislation expressly changing the meaning as interpreted by the Supreme Court, and we do not believe that it intended to extend this reward beyond this particular group. We do not think that it meant to give the benefit of such an inferential change in the meaning of the oath of allegiance to any alien conscientious objector who like the appellee here has not served and is not serving in the armed forces, or to conscientious objectors opposed to participate in non-combatant service who have been assigned to work of national importance under civilian direction.

[1] The court considered only the Act of March 27, 1942.

We think that this conclusion is sound, that it is consistent with this Court's approach to similar problems in the naturalization laws, see *Toyota v. United States,* 268 U. S. 402, and that petitioner's contentions break down, once the amendments and their legislative history are considered. Clearly, nothing in the language of the 1942 amendments supports the broad and generalized implications which petitioner seeks to draw therefrom; these amendments do not in terms water down the meaning of the oath. The committee reports and congressional debates are likewise barren of any reference to the status of conscientious objectors. Nor do they contain any suggestion that it was intended to extend the benefits of the amendments to persons not specifically falling within their terms. See S. Reps. 989, 1664, and H. Reps. 1765, 1896, 77th Cong., 2d sess.; 88 Cong. Rec. 1589, 1790–1791, 1794. See also H. Rep. 1710, 77th Cong., 2d sess. The statutes in question have the limited purpose of rewarding alien members of the armed forces and alien veterans by facilitating their naturalization. As the Senate Committee said (S. Rep. 989, 77th Cong., 2d sess., p. 7), "The bill provides that an alien honorably serving in our armed forces during the present war may acquire citizenship without regard to the normal qualifications of age, length of residence, and education. This provision also carries forward the policy of the United States during the last World War and provides appropriate and

expeditious procedure for its administration." We note in the margin the earlier statutes in question.[8]

It does not follow that the 1942 amendments, which have the effect of authorizing the naturalization of persons who are actually performing or have performed noncombatant military service, represent a congressional declaration that aliens outside that specified group are similarly entitled to naturalization.[9] Congress had dealt generally with the subject of naturalization in 1940. It is reasonable to suppose that, if it had intended to permit the naturalization of aliens who were willing to defend the United States in a noncombatant capacity only, it would have expressed its intention at that time. But, as we have shown (*supra*, pp. 23–30), it took the other alternative. It then reenacted and fortified the arms-bearing rule, as previously it had consistently failed to adopt bills seeking a relaxation of that requirement. Having made that deliberate choice in 1940, it would certainly be extremely unreasonable to suppose that Congress would have reversed itself on a considered decision dealing with a qualification of gen-

[8] Act of May 9, 1918, c. 69, 40 Stat. 542; Act of July 19, 1919, c. 24, 41 Stat. 222; Act of May 26, 1926, c. 398, 44 Stat. 654; Act of March 4, 1929, c. 683, 45 Stat. 1545; Act of May 25, 1932, c. 203, 47 Stat. 165; Act of June 24, 1935, c. 288, 49 Stat. 395; Act of August 23, 1937, c. 735, 50 Stat. 743; Act of June 21, 1939, c. 234, 53 Stat. 851; Section 324 of the Nationality Act of 1940, 8 U. S. C. 724.

eral application while passing an amendment designed to cover only a limited group deemed worthy of preferred treatment. It is not likely that in legislation of limited application Congress intended to effect, without a word of comment, such a fundamental change in the requirements for naturalization. We cannot properly assume that in such cavalier fashion, by silent indirection, Congress intended to depart from the established rule of exacting from the general body of applicants for citizenship a promise to bear arms if necessary. Compare *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 627.

The result reached by the court below had in consequence been arrived at also by two district courts. *In re Kinloch*, 53 F. Supp. 521 (W. D. Wash.); *In re Sawyer*, 59 F. Supp. 428 (D. Del.).

But petitioner urges, adopting the views of the dissenting judge below (R. 29), that the oath cannot mean one thing to an alien who has served in the armed forces and another to one who has not (Pet. Br. 26–27), a view which appears to have led the district court for the District of Columbia to hold that even a noncombatant who has served in the Army cannot be admitted to citizenship unless he is unqualifiedly willing to bear arms in the future. *In re Nielsen*, 60 F. Supp. 240.

We think, however, that this consideration is not controlling. We are not dealing with lex-

icographers' definitions; the problem is one of ascertaining whether a particular word was used by Congress with the same or with differing meanings. This Court has frequently applied the rule that a word may mean one thing in one section of a statute and yet have a broader or narrower scope when used elsewhere in the same act. *E. g., Helvering* v. *Stockholms &c. Bank,* 293 U. S. 84, 86–88; *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 433–434. Similarly the expression in Article III of the Constitution, "all Cases * * * arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," has a far broader meaning than the almost literal copy in Section 24 (1) of the Judicial Code, 28 U. S. C. 24 (1), "all suits * * * where the matter in controversy * * * arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority." Compare *Puerto Rico* v. *Russell & Co.,* 288 U. S. 476, 485; *Gully* v. *First National Bank,* 299 U. S. 109, 113–114.

And while, standing alone, there might be persuasiveness in petitioner's contention that the oath must have been intended by Congress to mean the same to all applicants, we think that the argument loses its force in the light of the other considerations canvassed above. Such an argument is, after all, but an aid to construction, an approach; it cannot be used to arrive by backhanded indirection

at a result which Congress on numerous occasions refused to reach directly. This becomes even more apparent when we consider the origin of the proviso excluding from veterans' benefits in naturalization statutes persons who were complete conscientious objectors who performed no military service or who refused to wear the uniform.

That provision was not new in 1942. Petitioner's argument assumes that it was new, and that it therefore reflects a legislative intention to relax the arms-bearing requirement as it existed in 1940. We have shown why the implications which he seeks to draw from the amendments fail, but the point now is that even those implications necessarily rest upon a preliminary assumption of novelty.

Actually, however, the 1942 proviso excluding complete objectors was not new. It originated in the Act of May 26, 1926, c. 398, 44 Stat. 654, 8 U. S. C. 241 (*infra*, p. 70), which made provision for the more expeditious naturalization of alien veterans of the first World War.[9]

[9] The Act of May 9, 1918, c. 69, 40 Stat. 542, amended the Naturalization Act of 1906, by providing that alien members of the armed forces could be naturalized without fulfilling the usual residence requirements and without filing a preliminary declaration of intention. The provisions of the Act were extended by the Act of July 19, 1919, c. 24, 41 Stat. 222, to apply for a limited time to alien veterans of the first World War.

The Act of May 26, 1926, contained a two year limitation for naturalization of alien veterans, and its provisions were

As in the case of the 1942 amendments, the legislative history of the 1926 Act is silent as to the position of conscientious objectors generally. See H. Reps. 382, 871, S. Rep. 566, 69th Cong., 1st sess.; 67 Cong. Rec. 4784–4785, 7334, 7392, 7956–7960, 8533, 9749, 9799, 9801. Thus, the Senate Committee which reported an early draft, one that did not include the proviso, stated (S. Rep. 566, 69th Cong., 1st sess., p. 2): "It is believed that the privileges given by this bill are but a measure of simple justice to those aliens who did not use the shield of their alienage to avoid service in our forces. * * * These aliens voluntarily met one of the greatest tests of patriotic citizenship."

The 1926 Act was passed some years before the arms-bearing requirement applied by the Naturalization Service was approved in the *Schwimmer*, *Macintosh*, and *Bland* cases and be-

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extended by the Acts of March 4, 1929, 45 Stat. 1545, and May 25, 1932, 47 Stat. 165. The 1932 Act was in turn extended by the Acts of June 24, 1935, 49 Stat. 395, August 23, 1937, 50 Stat. 743, and June 21, 1939, 53 Stat. 851. The last extension was until May 25, 1940. Section 324 of the Nationality Act of 1940, 54 Stat. 1149, 8 U. S. C. 724, provides for expeditious naturalization of persons who have served honorably in the military forces for three years. This section does not, however, contain the provision as to conscientious objectors. The legislative history of the section does not explain the omission. See S. Rep. 2150, 76th Cong., 3d sess., pp. 2–3; Hearings on the Nationality Act, *supra*, pp. 106–108, 450–451.

came a question which provoked general discussion. We therefore think it reasonable to assume that the proviso was originally adopted, not with a view to enlarging the classes of aliens eligible to naturalization, but rather to make certain, out of an abundance of caution, that a particular class—the complete conscientious objectors—should not be accorded the special dispensation of the other relaxations accorded to alien veterans. It may well be, therefore, on the basis of purely logical considerations, on the assumption that the oath must be deemed to have the same content for veterans and non-veterans alike, that the weight of reason is with *In re Nielsen, supra,* which refused to naturalize a non-combatant veteran, and not with petitioner or the dissenting judge below, who would naturalize all non-combatants whether veterans or not. *Cf. Toyota* v. *United States,* 268 U. S. 402.

We believe, however, that the conclusion reached by the court below and by *In re Kinloch* and *In re Sawyer,* both *supra,* is not only preferable but correct: the noncombatant veteran is entitled to naturalization, the noncombatant non-veteran is not.

For we believe that the conclusion to be drawn from all the legislative evidence considered above is properly this: Congress was considering what it deemed to be two distinct problems. One was naturalization generally, the other was naturaliza-

tion for veterans. In dealing with the former problem, it insisted that alien applicants for citizenship manifest an unqualified willingness to bear arms, and refused on numerous occasions to change or relax that requirement. In dealing with the veteran question, it insisted only that the veteran should not have been a complete conscientious objector—but without indicating that it was concerned in that connection with the problem in its general application. The result favors the noncombatant alien veteran over the noncombatant alien non-veteran, and is thus consistent with the pattern of much else in the naturalization laws.

We conclude, therefore, that the relaxation of the oath so far as noncombatant alien veterans is concerned can no more be held to include petitioner than can any of the other statutory waivers which the 1942 amendments extended. And the parallel handling of the two lines of statutes shows even more clearly that Congress never had the slightest intention, when it passed the amendments now in question, of reversing under cover of silence and outward unawareness a consistent pattern of general application which over more than a decade's time it had refused to vary by overt alteration.[10]

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[10] Petitioner's suggestion (Pet. Br. 33, note 14) that Miss Bland would now appear to be eligible for citizenship under the Act of December 7, 1942, *supra*, turns on whether her

IV. WHILE THE *SCHWIMMER*, *MACINTOSH*, AND *BLAND* CASES ARE NOT OPEN FOR RECONSIDERATION HERE IN VIEW OF SUBSEQUENT CONGRESSIONAL ACTION, THE LOGIC OF EVENTS SINCE THEY WERE DECIDED CONFIRMS THEIR SOUNDNESS

1. As we have pointed out, *supra* pp. 17–30, Congress through its silence in the years following *United States* v. *Schwimmer*, 279 U. S. 644, *United States* v. *Macintosh*, 283 U. S. 605, and *United States* v. *Bland*, 283 U. S. 636, must be taken to have approved the rulings in those cases, and in 1940, by reenacting in substantially unaltered form the statutory provisions involved in those decisions and by giving statutory sanction to the oath there considered which heretofore had been prescribed only administratively, it clearly reenacted the requirements for naturalization as interpreted by this Court. We have also pointed out that Congress consistently refused to enact into law bills which would have permitted the naturalization of alien conscientious objectors. *Supra*, pp. 19–22.

membership in "the reconstruction unit of the United States Government" and her performance of "the duties of a nurse in the psychiatric department at Brest, France" (Record in *United States* v. *Bland*, No. 505, Oct., T., 1930, p. 14) constituted membership in "the military or naval forces of the United States" as defined in the Act, and also on whether her going to France "the day the armistice was signed" (*ibid.*) falls within the prescribed time limits. Whatever the answer to these questions, they do not concern us here; they throw no light on whether the Act helps petitioner, who admittedly is not within its terms.

In view of this compelling legislative history of Congressional action and of highly significant Congressional inaction, the rule of the *Schwimmer, Macintosh,* and *Bland* cases has become a statutory rule, having an independent legislative basis, which, we submit, can be reconsidered only by Congress, and which is not open for reconsideration or reexamination here.

We need not stop now to inquire when and to what extent adherence to the precept of *stare decisis* is either necessary or desirable. There is here no question of common law, requiring resolution of the paradox that "law must be stable and yet it cannot stand still," Pound, *Interpretations of Legal History,* 1; *cf.* Cardozo, *The Growth of the Law, passim.* There is before this Court no problem of reconciling situations which involve similar factual patterns embroidered with varying niceties of legal expression, such as this Court considered against an equivocal background of legislative history in *Helvering* v. *Hallock,* 309 U. S. 106. The present case does not require a reexamination of constitutional doctrine in the light of legislative reenactments which necessarily question earlier judgments or decisions on constitutional issues. See *Helvering* v. *Griffiths,* 318 U. S. 371, 400–401, discussed in Petitioner's Brief, pp. 33–34. Nor is there here any question of either the power or the propriety of this Court's reexamination and reconsideration of its prior

constitutional determinations; we have ourselves, *supra*, pp. 39–42, invited a reexamination of the constitutional aspect of the *Macintosh* decision.

The proposition here is broader and bolder: It is that this Court rewrite an Act of Congress. It is that this Court, by reconsidering the steps which led to a result which Congress has since independently adopted, arrive at a new result which Congress advisedly refused to adopt.

We submit that there is no authority for such action. While some of the reasoning underlying the decisions in question may have been disapproved in another setting since their date, *cf. Schneiderman* v. *United States*, 320 U. S. 118, 132, 135, we are not now dealing with judicial decisions or legal reasoning, but with a result which the national legislature has adopted and refused to alter. If that result is now to be rejected, if the requirement that an applicant for citizenship must be willing to bear arms is to be relaxed, specific Congressional action to that effect is necessary.

2. But we do not wish to be understood as questioning in any degree the soundness of the decisions in the *Schwimmer*, *Macintosh*, or *Bland* cases. It is true that the opinion of this Court in the *Schwimmer* case has not been deemed as quotable as the eloquent (though unclearly reasoned, see pp. 32, 38, *supra*) dissent of Mr. Justice

Holmes, and that the literary quality of the *Macintosh* opinion may suffer by comparison with Chief Justice Hughes' magistral dissent. But we are dealing with these pronouncements as law, and not as literature or logic. And if we pay heed to the oft-repeated admonition that "The life of the law has not been logic: it has been experience" (Holmes, *The Common Law,* 1), we are forced to the conclusion that the inexorable sweep of our national experience since 1929 and 1931 confirms the wisdom and the statesmanlike instinct of the majority opinions.

When those cases were decided, the world was at peace. The Kellogg-Briand Pact, signed on August 27, 1928, and proclaimed on July 24, 1929 (46 Stat. 2343), was assumed to mark in fact as well as in law the end of human wars. The memory of the first World War was receding into a background of unreality. The evacuation of the Rhineland in 1930, five years before the treaty date, appeared to usher in a new era of international good-feeling. The National Socialists were a small party in Germany, not regarded seriously anywhere, and Manchuria was still being administered under Chinese suzerainty. War was then widely considered to be the nadir of human conduct. The doctrine of pacifism—of non-resistance—was popular. At such a time and against such a background it is hardly surprising that the

denial of citizenship to well-educated and well-behaved individuals, all of whom were at least beyond probable military age and two of whom were women, on the ground of their refusal to bear arms in the exceedingly hypothetical and improbable event of another war, should have failed to command agreement among significant segments of the population. There were sharp cleavages in this Court, and, as indicated above, we are prepared to accept the statement in the Petition for Certiorari (p. 17) that contemporary professional comment on the decisions was predominantly adverse.

But the logic of events soon transferred the question of bearing arms from the field of hypothesis to that of stark immediacy. Peace yielded to aggression, year after tragic year. The Manchurian incident in September of 1931 was followed by the attack on Shanghai in 1932, by the rise to power of Hitler and his hordes in 1933, by the assassination of the Austrian Chancellor in 1934, by the violation of Ethiopia in 1935; there is no need to continue the grim chronology. The forces of darkness, once loosed, swept relentlessly and remorselessly over Europe and Asia, crushing political freedom, crushing religious freedom, overwhelming with a destructive nihilism every human value and every aspect of human decency, until finally millions of human lives were ruth-

lessly extinguished in a series of scientific slaughter-houses by the side of which the most outrageous excesses of the Huns of Atilla and the Barbarian hosts of old pale by comparison into orderly decency.

The dark tide struck this country in December 1941, and we were faced with a struggle for our very existence. We triumphed in the end, after many weary, costly, bloody months—because of force, superior force, force of arms. We learned anew in our generation the inescapable lesson that peace is not a matter of unilateral good intentions, that hard-earned liberties are not self-executing, and that to a free people war with all its horrors is yet infinitely preferable to submission. The liberties which we in consequence can still enjoy, and which petitioner can still enjoy, were preserved only through the exertion of millions of arms-bearing citizens, and through the costly sacrifice which over three hundred thousand Americans laid on the altar of freedom.

It is urged that petitioner has been willing to share in that sacrifice by offering to render noncombatant service. No one familiar with the limitless complexities of total warfare at the dawn of the atomic age would suggest for a moment that victory could have been achieved solely by men with rifles. But the noncombatants were after all only auxiliaries to the combatant forces, to those

who bore the heat and the brunt of battle, and Congress could reasonably exact a higher degree of service from those asking to join our political society than from those already members of the body politic. Those who seek the benefits of our citizenship may properly be called upon for willingness to meet its most arduous burdens.

In the retrospect of some fifteen years' hindsight, the requirements laid down by the decisions of this Court in the cases of *Rosika Schwimmer*, of *Douglas Macintosh*, and of *Marie Bland*, and thereafter legislatively adopted by the Congress, assume a prophetic wisdom that could not have been apparent to all in the peaceful years between the wars. The principle that one who desires citizenship in a free republic must be prepared if need be to fight in defense of his country's freedom has amply justified itself. The extent of one's attachment to the principles of the Constitution is properly measured by the contribution which may be exacted from him in a time of national peril; the test of one's willingness to defend the Constitution against all enemies becomes more critical and more real when the enemy actually attacks.

After the searing experiences of the past half-generation, there is certainly no occasion now to make available the priceless heritage of American citizenship to one who will not meet the price that Congress asks.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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FEBRUARY 1946.

APPENDIX A

The pertinent provisions of the Nationality Act of 1940 (Act of October 14, 1940, c. 876, 54 Stat. 1137), as amended by the Act of March 27, 1942, c. 199, 56 Stat. 176, 182–183, and by the Act of December 7, 1942, c. 690, 56 Stat. 1041, are as follows:

SEC. 307. (a) (8 U. S. C. 707 (a)) No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

* * * * *

SEC. 323a. (8 U. S. C., Supp. IV, 723a) A person who was a member of the military or naval forces of the United States at any time after April 5, 1917, and before November 12, 1918, or at any time after April 20, 1898, and before July 5, 1902, or who served on the Mexican Border as a member of the regular Army or National Guard from June

1916, to April 1917, who is not an alien ineligible to citizenship, who was not at any time during such period or thereafter separated from such forces under other than honorable conditions, who was not a conscientious objector who performed no military duty whatever or refused to wear the uniform, and who was not at any time during such period or thereafter discharged from the military or naval forces on account of his alienage, shall, if he has resided in the United States continuously for at least two years pursuant to a legal admission for permanent residence in lieu of the usual five years' residence within the United States and six months' residence within the State of his residence at the time of filing the petition for naturalization, during all of which two-year period he has behaved as a person of good moral character, be entitled at any time within one year after the date of approval of this Act to naturalization upon compliance with all of the requirements of the naturalization laws, except that—

(1) no declaration of intention shall be required;

(2) no certificate of arrival shall be required unless such person's admission to the United States was subsequent to March 3, 1924; and

(3) no residence within the jurisdiction of the court shall be required.

Such petitioner shall verify his petition for naturalization by the affidavits of at least two credible witnesses who are citizens of the United States, or shall furnish the depositions of two such witnesses made in accordance with the requirements of subsection (e) of section 327 of the Nationality Act of 1940, to prove the required residence.

good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States. On applications filed for any benefits under this Act, the requirement of fees for naturalization documents is hereby waived.

* * * * *

SEC. 335. (8 U. S. C. 735) (a) A person who has petitioned for naturalization shall, before being admitted to citizenship, take an oath in open court (1) to support the Constitution of the United States, (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen, (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic, and (4) to bear true faith and allegiance to the same, provided that in the case of the naturalization of a child under the provisions of section 315 or 316 the naturalization court may waive the taking of such oath if in the opinion of the court the child is too young to understand its meaning.

(b) The oath prescribed by subsection (a) of this section which the petitioner for naturalization is required to take, shall be in the following form:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and

domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God. In acknowledgment whereof I have hereunto affixed my signature.

* * * * *

SEC. 701. (8 U. S. C., Supp. IV, 1001) Notwithstanding the provisions of sections 303 and 326 of this Act, any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and who, having been lawfully admitted to the United States, including its Territories and possessions, shall have been at the time of his enlistment or induction a resident thereof, may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; and (4) no fee shall be charged or collected for making, filing, or docketing the petition for naturalization, or for the final hearing thereon, or for the certification of naturalization, if issued: ***Provided, however,*** That (1) there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each such witness personally knows the petitioner to be a person of good moral character, attached to the principles of the

Constitution of the United States, and well disposed to the good order and happiness of the United States, (2) the service of the petitioner in the military or naval forces of the United States shall be proved by affidavits, forming part of the petition, of at least two citizens of the United States, members or former members during the present war of the military or naval forces of the noncommissioned or warrant officer grade or higher (who may be the witnesses described in clause (1) of this proviso), or by a duly authenticated copy of the record of the executive department having custody of the record of petitioner's service, showing that the petitioner is or was during the present war a member serving honorably in such armed forces, and (3) the petition shall be filed not later than one year after the termination of the effective period of those titles of the Second War Powers Act, 1942, for which the effective period is specified in the last title thereof. The petitioner may be naturalized immediately if prior to the filing of the petition the petitioner and the witnesses required by the foregoing proviso shall have appeared before and been examined by a representative of the Immigration and Naturalization Service.

SEC. 702. (8 U. S. C., Supp. IV, 1002) During the present war, any person entitled to naturalization under section 701 of this Act, who while serving honorably in the military or naval forces of the United States is not within the jurisdiction of any court authorized to naturalize aliens, may be naturalized in accordance with all the applicable provisions of section 701 without appearing before a naturalization court. The petition for naturalization of any petitioner under this section shall be made and sworn to

before, and filed with, a representative of the Immigration and Naturalization Service designated by the Commissioner or a Deputy Commissioner, which designated representative is hereby authorized to receive such petition in behalf of the Service, to conduct hearings thereon, to take testimony concerning any matter touching or in any way affecting the admissibility of any such petitioner for naturalization, to call witnesses, to administer oaths, including the oath of the petitioner and his witnesses to the petition for naturalization and the oath of renunciation and allegiance prescribed by section 335 of this Act, and to grant naturalization, and to issue certificates of citizenship: *Provided,* That the record of any proceedings hereunder together with a copy of the certificate of citizenship shall be forwarded to and filed by the clerk of a naturalization court in the district in which the petitioner is a resident and be made a part of the record of the court.

* * * * *

SEC. 704. (8 U. S. C., Supp. IV, 1004) The provisions of this title shall not apply to (1) any person who during the present war is dishonorably discharged from the military or naval forces or is discharged therefrom on account of his alienage, or (2) any conscientious objector who performed no military duty whatever or refused to wear the uniform: *Provided,* That citizenship granted pursuant to this title may be revoked as to any person subsequently dishonorably discharged from the military or naval forces in accordance with Section 338 of this Act; and such ground for revocation shall be in addition to any other provided by law.

APPENDIX B

Section 4 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596, read in part as follows:

> That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:
>
> * * * * * *
>
> Third.—He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or a subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.
>
> Fourth.—It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of

at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

The Act of May 26, 1926, c. 398, 44 Stat. 654, provided in part as follows:

SEC. 1. (8 U. S. C. 241) That (a) as used in this Act, the term "alien veteran" means an individual, a member of the military or naval forces of the United States at any time after April 5, 1917, and before November 12, 1918, who is now an alien not ineligible to citizenship; but does not include (1) any individual at any time during such period or thereafter separated from such forces under other than honorable conditions, (2) any conscientious objector who performed no military duty whatever or refused to wear the uniform, or (3) any alien at any time during such period or thereafter discharged from the military or naval forces on account of his alienage.

* * * * *

SEC. 7. An alien veteran shall, if residing in the United States, be entitled, at any time within two years after the enactment of this Act, to naturalization upon the same terms, conditions, and exemptions which would have been accorded to such alien if he had petitioned before the armistice of the World War, except that such alien shall be required to appear and file his petition in person and to take the prescribed oath of allegiance in open court.

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FEB 26 1946

IN THE

Supreme Court of the United States

OCTOBER TERM—1945

No. 572

JAMES LOUIS GIROUARD,

Petitioner,

against

UNITED STATES OF AMERICA.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

ERNEST ANGELL,
JULIEN CORNELL,
JOHN W. DAVIS,
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Preliminary Statement

The American Civil Liberties Union as a non-profit organization devoted to the protection of civil rights in the United States, is concerned with the infringement of freedom of thought and belief which has arisen through the denial to the petitioner of the right to become a citizen because of his religious scruples against combatant military service. Counsel for all parties have consented to the filing of this brief.

Statement of the Case

The petitioner, James Louis Girouard, filed in 1940 a declaration of intention to become a citizen, in which he stated that he is a native of Canada and a British citizen,

that he had entered the United States for permanent residence in 1923, that a child was subsequently born in Massachusetts to petitioner and his Canadian wife, that he was of French descent and an engineer by occupation, that before being admitted to citizenship he would renounce all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, that he was not an anarchist or polygamist, nor a believer in polygamy, and that it was his intention in good faith to become a citizen of the United States and to reside permanently therein (R. 2-3).

In connection with his petition for naturalization filed in 1943 (R. 9), the petitioner was required by the Immigration and Naturalization Service to answer certain questions on a printed form (R. 4), on which he stated his willingness to take the oath of allegiance to the United States, but declared that he would not be willing to take up arms in defense of the country (R. 7). The full text of the questions on the form and of petitioner's answers thereto are as follows:

> "Have you read the following oath of allegiance? Yes.
>
> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So Help Me God.
>
> Are you willing to take this oath in becoming a citizen? Yes. Of what country are you now a citizen or subject? Great Britain.
>
> If necessary, are you willing to take up arms in defense of this country? No (Non-combatant) Seventh Day Adventist. Have you ever during the time this country was at war, deserted the military or

naval forces of the United States, or departed from the jurisdiction of the enrollment district of the United States to avoid draft into the military or naval forces of the United States? No."

After filing the statement quoted above, the petitioner was called before a Naturalization Examiner and was interrogated regarding his scruples against military service:

"Q. It is noted on page 2 under question 26 which asks, 'If necessary, are you willing to take up arms in defense of this country' your answer is 'no,' which has been qualified by the word 'Non Combatant,' have you any remark to make on this point? A. Not except that it is a purely religious matter with me, I have no political or personal reasons other than that.

Q. Then you are unwilling to bear arms in defense of this country? A. That is right.

Q. Have you anything further to say? A. No, I believe there is nothing else I would add to that.

It was explained to Mr. Girouard that the Supreme Court has ruled that it is necessary that a petitioner be willing to bear arms in defense of this country.

Applicant states he prefers to present his case to the court." (R. 19).

The Immigration Service also inquired of petitioner's draft board whether he had claimed exemption from military service as a conscientious objector and received a reply in the affirmative from the clerk of the board (R. 21).

Subsequently the petitioner presented his petition for naturalization to the United States District Court for the District of Massachusetts on August 1, 1944 (R. 14). The Naturalization Examiner recommended that the petition be denied (R. 18). The District Judge then questioned the petitioner regarding his unwillingness to bear arms and his testimony is related in narrative form in the record (18) as follows:

> "No transcript of this examination was made, but it appears that the appellee testified that he was a member of the Seventh Day Adventist sect, of whom he said there were apparently 10,000 serving in the armed forces of the United States as non-combatants, especially in the Medical Corps, and that he was willing to serve in the army as such non-combatant, but would not bear arms."

The court ordered that the petitioner be admitted to citizenship. Its opinion (R. 18) is unreported. The Naturalization Examiner filed a notice of exception to the court's ruling (R. 16) and the United States Attorney filed a notice of appeal to the Circuit Court of Appeals for the First Circuit (R. 22).

The Circuit Court of Appeals on June 1, 1945 reversed the judgment of the District Court and remanded the case in an opinion by Circuit Judges MAHONEY and HEALEY, reported at 149 Fed. 2d 760. The court based its decision on the ground that the case is controlled and the court bound by the decisions of this court in *United States* v. *Schwimmer*, 279 U. S. 644, *United States* v. *Macintosh*, 283 U. S. 605, and *United States* v. *Bland*, 283 U. S. 636. A dissenting opinion was filed by Circuit Judge WOODBURY, reported at 149 Fed. 2d 764. He took the view that Congressional enactments since the *Schwimmer*, *Macintosh* and *Bland* cases show that those decisions do not presently reflect the intent of Congress, and that those cases should not be followed because they no longer express the law and this court would not follow them today.

Subsequently petitioner filed a petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals, which was granted by this court on December 10, 1945, —— U. S. —— (R. 36).

Statutes

Nationality Code, 8 U. S. C. § 735 (a) and (b):

§ 735. *Oath of renunciation and allegiance.*

"(a) A person who has petitioned for naturalization shall, before being admitted to citizenship, take an oath in open court (1) to support the Constitution of the United States, (2) to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which the petitioner was before a subject or citizen, (3) to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic, and (4) to bear true faith and allegiance to the same, provided that in the case of the naturalization of a child under the provisions of section 715 or 716 the naturalization court may waive the taking of such oath if in the opinion of the court the child is too young to understand its meaning.

(b) The oath prescribed by subsection (a) of this section which the petitioner for naturalization is required to take, shall be in the following form:

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So Help me God. In acknowledgment whereof I have hereunto affixed my signature."

Nationality Code, 8 U. S. C. § 1001, 1004, added by amendment of March 27, 1942, 56 Stat. 182:

"§ 1001. *Exception from certain requirements.* Notwithstanding the provisions of sections

703 and 726 of this title, any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and who, having been lawfully admitted to the United States including its Territories and possessions, shall have been at the time of his enlistment or induction a resident thereof, may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; and (4) no fee shall be charged or collected for making, filing, or docketing the petition for naturalization, or for the final hearing thereon, or for the certification of naturalization, if issued; • • •

§ 1004. *Persons excepted from subchapter; revocation of citizenship upon dishonorable discharge*

The provisions of this subchapter shall not apply to (1) any person who during the present war is dishonorably discharged from the military or naval forces or is discharged therefrom on account of his alienage, or (2) any conscientious objector who performed no military duty whatever or refused to wear the uniform: Provided, That citizenship granted pursuant to this subchapter may be revoked as to any person subsequently dishonorably discharged from the military or naval forces in accordance with Section 738 of this title; and such ground for revocation shall be in addition to any other provided by law."

POINT I

The *Schwimmer, Macintosh* and *Bland* cases were wrongly decided and should not now be followed by this court.

In *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605, and *United States* v. *Bland*, 283 U. S. 636, this court interpreted the oath to "support and defend the Constitution and laws of the United States against all enemies foreign and domestic and bear true faith and allegiance to the same" which was then and is now prescribed for naturalization (34 Stat. 597, as amended, 53 Stat. 844, and reenacted without change, 54 Stat. 1157, 8 U. S. C. Sec. 735).

Since 1923, the form of preliminary application which the Immigration and Naturalization Service has required of candidates for naturalization has contained the question "If necessary, are you willing to take up arms in defense of this country?"* The same question was asked of the petitioner and he answered "No (Non Combatant)".

The Immigration and Naturalization Service has consistently opposed the naturalization of persons who failed to answer "Yes" to the foregoing question, and this court in the *Schwimmer, Macintosh* and *Bland* cases upheld the position of the Service on the theory that Congress in prescribing the oath of allegiance had impliedly made it a prerequisite for naturalization that the petitioner express a willingness to bear arms. There are factual differences between the position with regard to military service taken by the petitioners Schwimmer, Macintosh and Bland, and the position of the present petitioner, and although the present case might be distinguished on the facts, no such

* Gordon, *The Refusal to Bear Arms as a Disqualification for Naturalization*, II Immigration and Naturalization Service Monthly Review, p. 125.

attempt will be made here because our argument does not depend on such a distinction and because the distinguishing features of this case are considered in the petitioner's own brief.

The precedent of the *Schwimmer, Macintosh* and *Bland* decisions has been questioned because of the close division of the court in those cases. Mr. Justice HOLMES, Mr. Justice BRANDEIS and Mr. Justice SANFORD dissented in the *Schwimmer* case. Chief Justice HUGHES, Mr. Justice HOLMES, Mr. Justice BRANDEIS and Mr. Justice (now Chief Justice) STONE dissented in the *Macintosh* and *Bland* cases.

We believe that this court wrongly decided the *Schwimmer, Macintosh* and *Bland* cases. We commend to this court's attention the dissenting opinions of Mr. Justice HOLMES and Chief Justice HUGHES. And we maintain that the error into which this court then fell in seeking to ascertain the will of Congress has been made plain by subsequent indications of Congressional intent.

It should be remarked at the outset that Congress has not made any specific requirement in this or any other statute that the oath of allegiance shall include a promise to bear arms. Such a requirement has been implied by the Immigration and Naturalization Service and by previous decisions of this court. The oath of allegiance in substantially the same words as quoted above has been prescribed since the adoption of the Constitution not only for naturalization but for public office and positions of trust. However, no such requirement was ever read into it before. The oath of allegiance has been freely taken by innumerable lawyers, civil service employees and public officials who entertained religious scruples against war. It has been interpreted by the United States Civil Service Commission as not excluding conscientious objectors from the civil service. Departmental Circular No. 286, November 8, 1941. The armed forces under the present draft act*

* Sec. 5 (g) Selective Training and Service Act of 1940.

have permitted the oath of allegiance to be taken by persons unwilling to bear arms, and it has been taken by thousands of conscientious objectors serving as non-combatants. It is true that the State of Illinois excluded a conscientious objector from the practice of law and was upheld by this court, *In re Summers*, 325 U. S. 561, but in other states conscientious objectors are permitted to take the oath required for admission to the bar. The *Summers* case is an example of the disastrous effect on our civil liberties of following the *Schwimmer* and *Macintosh* cases.

This court in the cited cases has therefore found behind the statute prescribing the oath a Congressional intent which does not appear on its face, which had not previously been supposed to be there, and which agencies of government other than the Naturalization Service have generally assumed not to exist.

Thus the court has imputed to Congress the intention to discriminate on a religious basis. In view of the long traditions of religious freedom upon which our laws are predicated, we think that even if it is within the power of Congress to make such a discrimination, the intention to do so should not be implied. Rather, in the absence of an express statutory declaration to the contrary, it should be presumed that Congress did *not* intend to discriminate on religious grounds. We agree with the dissenters in the *Schwimmer* and *Macintosh* cases that a statute "should be construed not in opposition to, but in accord with, the theory and practice of our government in relation to freedom of conscience" (Chief Justice HUGHES dissenting in *United States* v. *Macintosh*, 283 U. S. 605, 635).

Since those dissents were uttered, the temper of the court with regard to issues of civil liberties has substantially changed, and the philosophy of the dissents now prevails. In *Schneiderman* v. *United States*, 320 U. S. 118, 132, the court said:

> "But because of our firmly rooted tradition of freedom of belief, we certainly will not presume in construing the naturalization and denaturalization acts that Congress meant to circumscribe liberty of political thought by general phrases in those statutes. As Chief Justice Hughes said in dissent in the *Macintosh* case, such general phrases 'should be construed, not in opposition to, but in accord with, the theory and practice of our Government in relation to freedom of conscience.' 283 U. S. at 635. See also Holmes, J., dissenting in *United States* v. *Schwimmer*, 279 U. S. 644, 653-55."

If the foregoing principles of statutory construction are applied here, the rule of the *Schwimmer*, *Macintosh* and *Bland* cases must now be overthrown.

POINT II

The 1942 amendment to the Nationality Act shows that Congress does not intend to exclude conscientious objectors from naturalization.

Whatever may have been the case previously, it is plainly shown by the 1942 amendment to the Nationality Code (56 Stat. 182-3, March 27, 1942, 8 U. S. C. 1001 *et seq.*) that Congress did not intend to require of applicants for naturalization an oath to bear arms.

The amendment facilitates the naturalization of aliens who have served in the armed forces, by eliminating the requirement of filing a declaration of intention, and the requirement of residence, and by removing other restrictions of the existing laws (8 U. S. C. sec. 1001). It applies to "any person not a citizen, regardless of age, who has served, or hereafter serves honorably in the military or naval forces of the United States during the present war". It applies to conscientious objectors who have served as

non-combatants as well as to men who have served in combatant capacities. *In re Kinloch*, 53 Fed. Supp. 521. The intention that the amendment should cover such conscientious objectors is specifically shown by the provision that it shall not apply "to any conscientious objector who performed no military duty whatever or refused to wear the uniform." 8 U. S. C. 1004.

The amendment does not change the oath. It does not provide a special oath for conscientious objectors entitled to its benefits. They must take the same oath which this court declared Schwimmer, Macintosh and Bland could not take. Thus Congress has made it perfectly clear that the oath does not demand a willingness to bear arms. In granting privileges to conscientious objectors for attaining citizenship Congress clearly intended that the oath could be taken by them.

Petitioner has not served in the armed forces and is not claiming the privileges of the amendment; he has fulfilled all the usual requirements for naturalization. But petitioner, or any other conscientious objector, can take the oath if, under the amendment, the oath can be taken by conscientious objectors who have served in the armed forces. For all conscientious objectors are alike in their ability to take the oath—they are all unwilling to make a promise to bear arms. And the words of the oath cannot mean one thing when applied to one person and another thing when applied to another person. The only possible interpretation which can be placed upon the 1942 amendment is that Congress did not intend to bar conscientious objectors from naturalization.

Any argument that the reenactment in 1940 of the naturalization laws (54 Stat. 1137) constituted a Congressional approval of the interpretation of the oath previously made by this court is overcome by the specific evidence of intent contained in the 1942 amendment, which makes clear that

such an interpretation is not tenable. And in any case such an inference cannot be justified because Congress, in spite of the division of the court, failed to add a specific requirement of willingness to bear arms when it added many new requirements for naturalization.

CONCLUSION

The naturalization laws should be construed so as to permit the petitioner and other conscientious objectors to subscribe to the oath and the petitioner should be admitted to citizenship.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
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Assent p. 2.

SUPREME COURT OF THE UNITED STATES.

No. 572.—October Term, 1945.

James Louis Girouard, Petitioner, vs. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[April 22, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

In 1943 petitioner, a native of Canada, filed his petition for naturalization in the District Court of Massachusetts. He stated in his application that he understood the principles of the government of the United States, believed in its form of government, and was willing to take the oath of allegiance (54 Stat. 1157, 8 U. S. C. § 735 b) which reads as follows:

> "I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So Help Me God."

To the question in the application "If necessary, are you willing to take up arms in defense of this country?" he replied, "No (Non-combatant) Seventh Day Adventist". He explained that answer before the examiner by saying "it is a purely religious matter with me, I have no political or personal reasons other than that." He did not claim before his Selective Service board exemption from all military service, but only from combatant military duty. At the hearing in the District Court petitioner testified that he was a member of the Seventh Day Adventist denomination, of whom approximately 10,000 were then serving in the armed forces of the United States as non-combatants, especially in the medical corps; and that he was willing to serve in the army but would not bear arms. The District Court admitted him to

citizenship. The Circuit Court of Appeals reversed, one judge dissenting. 149 F. 2d 760. It took that action on the authority of *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605, and *United States* v. *Bland*, 283 U. S. 636, saying that the facts of the present case brought it squarely within the principles of those cases. The case is here on a petition for a writ of certiorari which we granted so that those authorities might be re-examined.

The *Schwimmer*, *Macintosh* and *Bland* cases involved, as does the present one, a question of statutory construction. At the time of those cases, Congress required an alien, before admission to citizenship, to declare on oath in open court that "he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same."[1] It also required the court to be satisfied that the alien had during the five year period immediately preceding the date of his application "behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Those provisions were reenacted into the present law in substantially the same form.[3]

While there are some factual distinctions between this case and the *Schwimmer* and *Macintosh* cases, the *Bland* case on its facts is indistinguishable. But the principle emerging from the three cases obliterates any factual distinction among them. As we recognized in *In re Summers*, 325 U. S. 561, 572, 577, they stand for the same general rule—that an alien who refuses to bear arms will not be admitted to citizenship. As an original proposition we could not agree with that rule. The fallacies underlying it were, we think, demonstrated in the dissents of Mr. Justice Holmes in the *Schwimmer* case and of Mr. Chief Justice Hughes in the *Macintosh* case.

The oath required of aliens does not in terms require that they promise to bear arms. Nor has Congress expressly made any such

[1] Naturalization Act of 1906, § 4, 34 Stat. 596.

[2] *Id.*

[3] We have already set forth in the opinion the present form of the oath which is required. It is to be found in the Nationality Act of 1940, 54 Stat. 1137, 1157, 8 U. S. C. § 735(b). Sec. 307(a) of that Act, 8 U. S. C. § 707(a), provides that no person shall be naturalized unless he has been for stated periods and still is "a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

finding a prerequisite to citizenship. To hold that it is required is to read it into the Act by implication. But we could not assume that Congress intended to make such an abrupt and radical departure from our traditions unless it spoke in unequivocal terms.

The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. Total war in its modern form dramatizes as never before the great cooperative effort necessary for victory. The nuclear physicists who developed the atomic bomb, the worker at his lathe, the seaman on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains—these, too, made essential contributions. And many of them made the supreme sacrifice. Mr. Justice Holmes stated in the *Schwimmer* case (279 U. S. p. 655) that "the Quakers have done their share to make the country what it is." And the annals of the recent war show that many whose religious scruples prevented them from bearing arms, nevertheless were unselfish participants in the war effort. Refusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions. One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. Devotion to one's country can be as real and as enduring among non-combatants as among combatants. One may adhere to what he deems to be his obligation to God and yet assume all military risks to secure victory. The effort of war is indivisible; and those whose religious scruples prevent them from killing are no less patriots than those whose special traits or handicaps result in their assignment to duties far behind the fighting front. Each is making the utmost contribution according to his capacity. The fact that his rôle may be limited by religious convictions rather than by physical characteristics has no necessary bearing on his attachment to his country or on his willingness to support and defend it to his utmost.

Petitioner's religious scruples would not disqualify him from becoming a member of Congress or holding other public offices. While Article VI, Clause 3 of the Constitution provides that such officials, both of the United States and the several States, "shall be bound by Oath or Affirmation, to support this Constitution", it significantly adds that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The oath required is in no material respect different

from that prescribed for aliens under the Naturalization Act. It has long contained the provision "that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion." R. S. § 1757, 5 U. S. C. § 16. As Mr. Chief Justice Hughes stated in his dissent in the *Macintosh* case (283 U. S. p. 631), "the history of the struggle for religious liberty, the large number of citizens of our country, from the very beginning, who have been unwilling to sacrifice their religious convictions, and in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be their allegiance to the will of God" — these considerations make it impossible to conclude "that such persons are to be deemed disqualified for public office in this country because of the requirement of the oath which must be taken before they enter upon their duties."

There is not the slightest suggestion that Congress set a stricter standard for aliens seeking admission to citizenship than it did for officials who make and enforce the laws of the nation and administer its affairs. It is hard to believe that one need forsake his religious scruples to become a citizen but not to sit in the high councils of state.

As Mr. Chief Justice Hughes pointed out (*United States* v. *Macintosh*, *supra*, p. 633) religious scruples against bearing arms have been recognized by Congress in the various draft laws. This is true of the Selective Training and Service Act of 1940, 54 Stat. 889, 50 U. S. C. App. § 305(g),[4] as it was of earlier acts

[4] Sec. 305(g) provides in part:

"Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the land or naval forces under this Act, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be assigned to work of national importance under civilian direction."

For earlier Acts see Act of February 24, 1864, 13 Stat. 6, 9; Act of January 21, 1903, 32 Stat. 775; Act of June 3, 1916, 39 Stat. 166, 197; Act of May 18, 1917, 40 Stat. 76, 78.

He who is inducted into the armed services takes an oath which includes the provision "that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever." 41 Stat. 809, 10 U. S. C. § 1581. Congress has thus recognized that one may adequately discharge his obligations as a citizen by rendering non-combatant as well as combatant services. This respect by Congress over the years for the conscience of those having religious scruples against bearing arms is cogent evidence of the meaning of the oath.[5] It is recognition by Congress that even in time of war one may truly support and defend our institutions though he stops short of using weapons of war.

That construction of the naturalization oath received new support in 1942. In the Second War Powers Act, 56 Stat. 176, 182, 8 U. S. C. Supp. IV, § 1001, Congress relaxed certain of the requirements for aliens who served honorably in the armed forces of the United States during World War II and provided machinery to expedite their naturalization.[6] Residence requirements were relaxed, educational tests were eliminated, and no fees were required. But no change in the oath was made; nor was any change made in the requirement that the alien be attached to the principles of the Constitution. Yet it is clear that these new provisions cover non-combatants as well as combatants.[7] If petitioner had served as a non-combatant (as he was willing to do), he could have been admitted to citizenship by taking the identical oath which he is willing to take. Can it be that the oath means

[5] And see Billings v. Truesdell, 321 U. S. 542, 549-550; Army Regulations No. 615-500, August 10, 1944, Sec. II, 15 (f) (2).

[6] Comparable provision was made in the Act of December 7, 1942, 56 Stat. 1041, 8 U. S. C. Supp. IV, § 723a, for those who served honorably in World War I, in the Spanish American War, or on the Mexican Border.

[7] In re Kinloch, 53 F. Supp. 521, involved naturalization proceedings of aliens, one of whom, like petitioner in the present case, was a Seventh Day Adventist. He had been inducted into the army as a non-combatant. His naturalization was opposed by the Immigration Service on the ground that he could not promise to bear arms. The court overruled the objection, stating, p. 523:

> "If conscientious objectors, who are aliens, performing military duty, and wearing the uniform, are not granted the privileges of citizenship under this act, then the act would be meaningless. It would be so made if an applicant, being a conscientious objector, who has attained the status of a soldier, performs military duty, and honorably wears the uniform (as is admitted in the instant cases), is denied citizenship. If the oath of allegiance is to be construed as requiring such applicant to agree, without mental reservation, to bear arms, then the result would be a denial of citizenship, even though Congress has conferred such privilege upon him."

And see In re Sawyer, 59 F. Supp. 428.

one thing to one who has served to the extent permitted by his religious scruples and another thing to one equally willing to serve but who has not had the opportunity? It is not enough to say that petitioner is not entitled to the benefits of the new Act since he did not serve in the armed forces. He is not seeking the benefits of the expedited procedure and the relaxed requirements. The oath which he must take is identical with the oath which both non-combatants and combatants must take. It would, indeed, be a strange construction to say that "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic" demands something more from some than it does from others. That oath can hardly be adequate for one who is unwilling to bear arms because of religious scruples and yet exact from another a promise to bear arms despite religious scruples.

Mr. Justice Holmes stated in the *Schwimmer* case (279 U. S. pp. 654-55): "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into as well as to life within this country." The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. As we recently stated in *United States* v. *Ballard*, 322 U. S. 78, 86, "Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education* v. *Barnette*, 319 U. S. 624." The test oath is abhorrent to our tradition. Over the years Congress has meticulously respected that tradition and even in time of war has sought to accommodate the military requirements to the religious scruples of the individual. We do not believe that Congress intended to reverse that policy when it came to draft the naturalization oath. Such an abrupt and radical departure from our traditions should not be implied. See *Schneiderman* v. *United States*, 320 U. S. 118, 132. Cogent evidence would be necessary to convince us that Congress took that course.

We conclude that the *Schwimmer*, *Macintosh* and *Bland* cases do not state the correct rule of law.

We are met, however, with the argument that even though those cases were wrongly decided, Congress has adopted the rule which they announced. The argument runs as follows: Many efforts were made to amend the law so as to change the rule announced by those cases; but in every instance the bill died in committee. Moreover, in 1940 when the new Naturalization Act was passed, Congress reenacted the oath in its pre-existing form, though at the same time it made extensive changes in the requirements and procedure for naturalization. From this it is argued that Congress adopted and reenacted the rule of the *Schwimmer*, *Macintosh*, and *Bland* cases. Cf. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 488-489.

We stated in *Helvering* v. *Hallock*, 309 U. S. 106, 119, that "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines." It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error. The history of the 1940 Act is at most equivocal. It contains no affirmative recognition of the rule of the *Schwimmer*, *Macintosh* and *Bland* cases. The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases. But for us, it is enough to say that since the date of those cases Congress never acted affirmatively on this question but once and that was in 1942. At that time, as we have noted, Congress specifically granted naturalization privileges to non-combatants who, like petitioner were prevented from bearing arms by their religious scruples. That was affirmative recognition that one could be attached to the principles of our government and could support and defend it even though his religious convictions prevented him from bearing arms. And, as we have said, we cannot believe that the oath was designed to exact something more from one person than from another. Thus the affirmative action taken by Congress in 1942 negatives any inference that otherwise might be drawn from its silence when it reenacted the oath in 1940.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 572.—October Term, 1945.

James Louis Girouard, Petitioner, vs. The United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[April 22, 1946.]

Mr. Chief Justice Stone dissenting.

I think the judgment should be affirmed, for the reason that the court below, in applying the controlling provisions of the naturalization statutes, correctly applied them as earlier construed by this Court, whose construction Congress has adopted and confirmed.

In three cases decided more than fifteen years ago, this Court denied citizenship to applicants for naturalization who had announced that they proposed to take the prescribed oath of allegiance with the reservation or qualification that they would not, as naturalized citizens, assist in the defense of this country by force of arms or give their moral support to the government in any war which they did not believe to be morally justified or in the best interests of the country. See *United States* v. *Schwimmer*, 279 U. S. 644; *United States* v. *Macintosh*, 283 U. S. 605; *United States* v. *Bland*, 283 U. S. 636.

In each of these cases this Court held that the applicant had failed to meet the conditions which Congress had made prerequisite to naturalization by § 4 of the Naturalization Act of June 29, 1906, c. 3592, 34 Stat. 596, the provisions of which, here relevant, were enacted in the Nationality Act of October 14, 14, 1940. See c. 876, 54 Stat. 1137, as amended by the Act of March 27, 1942, c. 199, 56 Stat. 176, 182-183, and by the Act of December 7, 1942, c. 690, 56 Stat. 1041, 8 U. S. C. §§ 707, 735. Section 4 of the Naturalization Act of 1906, paragraph "Third", provided that before the admission to citizenship the applicant should declare on oath in open court that "he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance

to the same." And paragraph "Fourth" required that before admission it be made to appear "to the satisfaction of the court admitting any alien to citizenship" that at least for a period of five years immediately preceding his application the applicant "has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same". In applying these provisions in the cases mentioned, this Court held only that an applicant who is unable to take the oath of allegiance without the reservations or qualifications insisted upon by the applicants in those cases manifests his want of attachment to the principles of the Constitution and his unwillingness to meet the requirements of the oath, that he will support and defend the Constitution of the United States and bear true faith and allegiance to the same, and so does not comply with the statutory conditions of his naturalization. No question of the constitutional power of Congress to withhold citizenship on these grounds was involved. That power was not doubted. See Selective Draft Law Cases, 245 U. S. 366; *Hamilton* v. *Regents*, 293 U. S. 245. The only question was of construction of the statute which Congress at all times has been free to amend if dissatisfied with the construction adopted by the Court.

With three other Justices of the Court I dissented in the *Macintosh* and *Bland* cases, for reasons which the Court now adopts as ground for overruling them.[1] Since this Court in three considered earlier opinions has rejected the construction of the statute for which the dissenting Justices contended, the question, which for me is decisive of the present case, is whether Congress has likewise rejected that construction by its subsequent legislative action, and has adopted and confirmed the Court's earlier construction of the statutes in question. A study of Congressional action taken

[1] In the opinion of the writer there was evidence in United States v. Schwimmer, 279 U. S. 644, from which the ~~two~~ court~~s below~~ could and did infer that applicant's behavior evidenced a disposition, present and future, actively to resist all laws of the United States and lawful commands of its officers for the furthering of any military enterprise of the United States, and actively to aid and encourage such resistance in others, and this the ~~two~~ court~~s below correctly~~ concluded evidenced a want of attachment of the applicant to the principles of the Constitution which the naturalization law requires to be exhibited by the behavior of the applicant, preceding the application for citizenship.

with respect to proposals for amendment of the naturalization laws since the decision in the *Schwimmer* case, leads me to conclude that Congress has adopted and confirmed this Court's earlier construction of the naturalization laws. For that reason alone I think that the judgment should be affirmed.

The construction of the naturalization statutes, adopted by this Court in the three cases mentioned, immediately became the target of an active, publicized legislative attack in Congress which persisted for a period of eleven years, until the adoption of the Nationality Act in 1940. Two days after the *Schwimmer* case was decided, a bill was introduced in the House, H. R. 3547, 71st Cong., 1st Sess., to give the Naturalization Act a construction contrary to that which had been given to it by this Court and which, if adopted, would have made the applicants rejected by this Court in the *Schwimmer*, *Macintosh* and *Bland* cases eligible for citizenship. This effort to establish by Congressional action that the construction which this Court had placed on the Naturalization Act was not one which Congress had adopted or intended, was renewed without success after the decision in the *Macintosh* and *Bland* cases, and was continued for a period of about ten years.[2] All of these measures were of substantially the same pattern as H. R. 297, 72d Cong., 1st Sess., introduced December 8, 1931, at the first session of Congress, after the decision in the *McIntosh* case. It provided that no person otherwise qualified "shall be debarred from citizenship by reason of his or her religious views or philosophical opinions with respect to the lawfulness of war as a means of settling international disputes, but every alien admitted to citizenship shall be subject to the same obligation as the native-born citizen." H. R. 3547, 71st Cong., 1st Sess., introduced immediately after the decision in the *Schwimmer* case, had contained a like provision, but with the omission of the last clause beginning "but every alien." Hearings were had before the House Committee on Immigration and Naturalization on both bills at which their proponents had stated clearly their purpose to set aside the interpretation placed on the oath of allegiance by

[2] H. R. 3547, 71st Cong., 1st Sess., 71 Cong. Rec. 2184; H. R. 297, 72d Cong., 1st Sess., 75 Cong. Rec. 95; H. R. 298, 72d Cong., 1st Sess., 75 Cong. Rec. 95; S. 3275, 72d Cong., 1st Sess., 75 Cong. Rec. 2600; H. R. 1528, 73d Cong., 1st Sess., 77 Cong. Rec. 90; H. R. 5170, 74th Cong., 1st Sess., 79 Cong. Rec. 1356; H. R. 8259, 75th Cong., 1st Sess., 81 Cong. Rec. 9193; S. 165, 76th Cong., 1st Sess., 84 Cong. Rec. 67.

the *Schwimmer* and *Macintosh* cases.[3] There was opposition on each occasion.[4] Bills identical with H. R. 297 were introduced in three later Congresses.[5] None of these bills were reported out of Committee. The other proposals, all of which failed of passage (see footnote 2, *ante*), had the same purpose and differed only in phraseology.

Thus, for six successive Congresses, over a period of more than a decade, there were continuously pending before Congress in one form or another proposals to overturn the rulings in the three Supreme Court decisions in question. Congress declined to adopt these proposals after full hearings and after speeches on the floor advocating the change. 72 Cong. Rec. 6966-7; 75th Cong. Rec. 15354-7. In the meantime the decisions of this Court had been followed in *Clarke's Case*, 301 Pa. 321; *Beale* v. *United States*, 71 F. 2d 737; *In re Warkentin*, 93 F. 2d 42. In *Beale* v. *United States*, *supra*, the court pointed out that the proposed amendments affecting the provisions of the statutes relating to admission to citizenship had failed, saying: "We must conclude therefore that these statutory requirements, as construed by the Supreme Court, have Congressional sanction and approval."

Any doubts that such were the purpose and will of Congress would seem to have been dissipated by the reenactment by Congress in 1940 of Paragraphs "Third" and "Fourth" of § 4 of the Naturalization Act of 1906, and by the incorporation in the Act of 1940 of the very form of oath which had been administratively prescribed for the applicants in the *Schwimmer*, *McIntosh* and *Bland* cases. See Rule 8(c), Naturalization Regulations of July 1, 1929.[6]

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[3] Hearings on H. R. 3547, pp. 12, 22, 29-57, 73-109, 169-180; Hearings on H. R. 297, pp. 4-7, 10, 12, 15-19, 41-48, 53-56, 66-81, 147, 148.

[4] Hearings on H. R. 3547, pp. 57-65, 73, 146-169, 181-212; Hearings on H. R. 297, pp. 85-140.

[5] H. R. 1528, 73d Cong., 1st Sess.; H. R. 5170, 74th Cong., 1st Sess.; H. R. 8259, 75th, Cong., 1st Sess.

[6] Section 307(a) of the Nationality Act, 8 U. S. C. § 707(a), provides that no person shall be naturalized unless for a period of five years preceding the filing of his petition for naturalization he "has been and still is a person . . . attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States." Section 335(a) of the Nationality Act, 8 U. S. C. § 735(a) provides that before an applicant for naturalization shall be admitted to citizenship, he shall take an oath in open court that inter alia he will "support and defend the Constitution and laws of the United States against all enemies, foreign and domestic and . . . bear true faith and allegiance to the same."

The Nationality Act of 1940 was a comprehensive, slowly matured and carefully considered revision of the naturalization laws. The preparation of this measure was not only delegated to a Congressional Committee, but was considered by a committee of Cabinet members, one of whom was the Attorney General. Both were aware of our decisions in the *Schwimmer* and related cases and that no other question pertinent to the naturalization laws had been as persistently and continuously before Congress in the ten years following the decision in the *Schwimmer* case. The modifications in the provisions of Paragraphs "Third" and "Fourth" of § 4 of the 1906 Act show conclusively the careful attention which was given to them.

In the face of this legislative history the "failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, as here, the application of the statute . . . has brought forth sharply conflicting views on the Court and in Congress, and where after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute." *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 488-9. And see to like effect *United States* v. *Ryan*, 284 U. S. 167-173; *United States* v. *Elgin, J. & E. Ry.*, 298 U. S. 492, 500; *Missouri* v. *Ross*, 299 U. S. 72, 75; cf. *Helvering* v. *Winmill*, 305 U. S. 79, 82, 83. It is the responsibility of Congress, in reenacting a statute, to make known its purpose in a controversial matter of interpretation of its former language, at least when the matter has, for over a decade, been persistently brought to its attention. In the light of this legislative history, it is abundantly clear that Congress has performed that duty. In any case it is not lightly to be implied that Congress has failed to perform it and has delegated to this Court the responsibility of giving new content to language deliberately readopted after this Court has construed it. For us to make such an assumption is to discourage, if not to deny, legislative responsibility. By thus adopting and confirming this Court's construction of what Congress had enacted in the Naturalization Act of 1906 Congress gave that construction the same legal significance as though it had written the very words into the Act of 1940.

The only remaining question is whether Congress repealed this construction by enactment of the 1942 amendments of the Nationality Act. That Act extended special privileges to applicants for naturalization who were aliens and who have served in the armed forces of the United States in time of war, by dispensing with or modifying existing requirements, relating to declarations of intention, period of residence, education, and fees. It left unchanged the requirements that the applicant's behavior show his attachment to the principles of the Constitution and that he take the oath of allegiance. In adopting the 1942 amendments Congress did not have before it any question of the oath of allegience with which it had been concerned when it adopted the 1940 Act. In 1942 it was concerned with the grant of special favors to those seeking naturalization who had worn the uniform and rendered military service in time of war and who could satisfy such naturalization requirements as had not been dispensed with by the amendments. In the case of those entitled to avail themselves of these privileges, Congress left it to the naturalization authorities, as in other cases, to determine whether, by their applications and their conduct in the military service; they satisfy the requirements for naturalization which have not been waived.

It is pointed out that one of the 1942 amendments, 8 U. S. C. Supp. IV, § 1004, provided that the provisions of the amendment should not apply to "any conscientious objector who performed no military duty whatever or refused to wear the uniform". It is said that the implication of this provision is that conscientious objectors who rendered noncombatant service and wore the uniform were, under the 1942 amendments, to be admitted to citizenship. From this it is argued that since the 1942 amendments apply to those who have been in noncombatant, as well as combatant, military service, the amendment must be taken to include some who have rendered noncombatant service who are also conscientious objectors and who would be admitted to citizenship under the 1942 amendments, even though they made the same reservations as to the oath of allegiance as did the applicants in the *Schwimmer*, *Macintosh* and *Bland* cases. And it is said that although the 1942 amendments are not applicable to petitioner who has not been in military service, the oath can not mean one thing as to him and another as to those who have been in the noncombatant service.

To these suggestions there are two answers. One is that if the 1942 amendment be construed as including noncombatants who are also conscientious objectors, who are unwilling to take the oath without the reservations made by the applicants in the *Schwimmer*, *Macintosh* and *Bland* cases, the only effect would be to exempt noncombatant conscientious objectors from the requirements of the oath, which had clearly been made applicable to all objectors, including petitioner, by the Nationality Act of 1940, and from which petitioner was not exempted by the 1942 amendments. If such is the construction of the 1942 Act, there is no constitutional or statutory obstacle to Congress' taking such action. Congress if it saw fit could have admitted to citizenship those who had rendered noncombatant service, with a modified oath or without any oath at all. Petitioner has not been so exempted.

Since petitioner was never in the military or naval forces of the United States, we need not decide whether the 1942 amendments authorized any different oath for those who had been in noncombatant service than for others. The amendments have been construed as requiring the same oath, without reservations, from conscientious objectors, as from others. *In re Nielsen*, 60 F. Supp. 240. Not all of those who rendered noncombatant service were conscientious objectors. Few were. There were others in the noncombatant service who had announced their conscientious objections to combatant service, who may have waived or abandoned their objections. Such was the experience in the First World War. See "Statement Concerning the Treatment of Conscientious Objectors in the Army", prepared and published by direction of the Secretary of War, June 18, 1919. All such could have taken the oath without the reservations made by the applicants in the *Schwimmer*, *Macintosh* and *Bland* cases and would have been entitled to the benefits of the 1942 amendments, provided they had performed military duty and had not refused to wear the uniform. The fact that Congress recognized by indirection, in 8 U. S. C. Supp. IV, § 1004, that those who had appeared in the role of conscientious objectors, might become citizens by taking the oath of allegiance and establishing their attachment to the principles of the Constitution, does not show that Congress dispensed with the requirements of the oath as construed by this Court and plainly confirmed by Congress in the Nationality Act of 1940. There is no necessary inconsistency in this respect between the 1940 Act and

the 1942 amendments. Without it repeal by implication is not favored. *United States* v. *Borden Co.*, 308 U. S. 188, 198-97, 203-6; *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 457; *United States Alkali Ass'n* v. *United States*, 325 U. S. 196, 209. The amendments and their legislative history give no hint of any purpose of Congress to relax, at least for persons who had rendered no military service, the requirements of the oath of allegiance and proof of attachment to the Constitution as this Court had interpreted them and as the Nationality Act of 1940 plainly required them to be interpreted. It is not the function of this Court to disregard the will of Congress in the exercise of its constitutional power.

Mr. Justice REED and Mr. Justice FRANKFURTER join in this opinion.